

Supreme Court, U. S.  
**FILED**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

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**No. 78 - 1501**

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**JAMES JEFFERSON McLAIN, ET AL.,**  
Petitioners,

versus

**REAL ESTATE BOARD OF  
NEW ORLEANS, INC., ET AL,**  
Respondents.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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JAMES JEFFERSON McLAIN, ET AL.,  
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REAL ESTATE BOARD OF  
NEW ORLEANS, INC., ET AL,  
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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT  
\_\_\_\_\_

The petitioner James Jefferson McLain, et al pray  
that a writ of certiorari issue to review the judgment  
and opinion of the United States Court of Appeals for  
the Fifth Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at  
583 F. 2d 1315 and is reprinted in the Appendix hereto

pp. 24a-42a *infra*. The opinion of the District Court for the Eastern District of Louisiana is reported at 432 F. Supp. 982 and is reprinted in the Appendix pp. 17a-23a *infra*. (hereinafter referred to as "App")

### JURISDICTION

The judgment of the Court of Appeals was rendered on November 15, 1978. Thereafter, a timely petition for panel rehearing was denied on December 15, 1978. (App. pp. 42a-43a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The basis of jurisdiction in the District Court was 15 U.S.C. §§ 1, 15 and 26.

### QUESTIONS PRESENTED

1. Whether a fixed commission equal to six percent of the purchase price of the home charged by all real estate brokers within the Greater New Orleans area on sales of residential real property is a price fix subject to control under federal anti-trust laws.

2. Whether the six percent fixed commission for real estate brokerage services charged by New Orleans area realtors on transactions involving residential real property has a "substantial effect" upon the interstate commerce aspects of such land transactions, to-wit: the interstate movement of home mortgage funds, and the procurement of property title insurance from out of state sources.

3. Whether buyers and sellers of homes in the Greater New Orleans area, and by implication, throughout the United States, should have the advantage of free-price competition as a factor in determining their choice of a real estate agent.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Article I § 8 of the Constitution of the United States provides in pertinent part that:

The Congress shall have Power

....

to regulate commerce with Foreign Nations, and among the several States, and with the Indian Tribes;

....

B. 15 U.S.C. § 1 provides in pertinent part that:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal.

C. 15 U.S.C. § 15 provides that:

Any person who shall be injured in his business or property by reason of anything for-



bidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of this suit including a reasonable attorney's fee.

D. 15 U.S.C. § 26 provides in pertinent part that:

Any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws.

E. 28 U.S.C. § 1254 (1) provides that:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

### STATEMENT OF THE CASE

This private anti-trust action for treble damages and injunctive relief was brought on behalf of the named

plaintiffs and the class they represent consisting of buyers and sellers of residential real property in New Orleans and its adjacent suburbs.

The suit was filed in October 1975 in the United States District Court for the Eastern District of Louisiana. Made defendants were two New Orleans area real estate associations, several named real estate firms and individual realtors and a class of defendant realtors doing business in New Orleans and nearby Jefferson Parish.

Numerous anti-competitive activities on the part of the realtors and their associations are alleged. (the entire complaint is reprinted for the Court's reference at App. pp. 1a-16a). The principal contention of the plaintiffs, however, is that the standard commission, six percent of the purchase price of the home, charged by realtors as their fee for services is a price fix violative of federal anti-trust laws.

In the trial court, defendants, at the outset, challenged the existence of subject matter jurisdiction alleging that their services are wholly local in nature and are neither "in interstate commerce" nor according to defendants, do their activities "affect interstate commerce" in any substantial way.

The realtors characterize their function simply as the bringing together of buyer and seller and little more. Their fee, they say, is earned when the purchase agree-



ment is signed; although as the District Court found, payment of the fee (the six percent) generally takes place at the time of the act of sale and is normally dependent upon the buyer's success in obtaining financing of the purchase, and, of course, is payable from the gross proceeds of the sale.

After an initial round of briefing of the jurisdictional issue, the trial court ordered discovery to be carried out to see:

whether a substantial volume of interstate commerce is involved in the over-all real estate transaction, and

whether the challenged activity is an essential, integral part of the transaction and inseparable from its interstate aspects.<sup>1</sup>

It was fairly well established that there is a substantial volume of interstate commerce involved in the over-all real estate transaction, via the procurement of home mortgage funds from out of state sources; the activities of federal agencies such as the Veterans Administration, the Federal Housing Administration and the Department of Housing and Urban Development through their various loan guarantee and subsidy programs, and finally, through the procurement of

<sup>1</sup> This language taken from the district court opinion, 432 F. Supp. 982 (App. pp. 20a-21a) is virtually the same as the language of the lower court's minute entry of September 3, 1976 in which the discovery was ordered.

property title insurance from sources outside the State of Louisiana.

In this respect, the situation in the New Orleans area does not appear to vary greatly from that in Fairfax County Virginia, scene of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). New Orleans is probably typical in this respect of most urban and suburban real estate markets in the country.

Plaintiffs, however, failed to establish that the challenged activity (brokerage service) is an "essential integral part of the transaction inseparable from its interstate aspects", and on that basis the case was dismissed.<sup>2</sup> On appeal to the United States Court of Appeals to the Fifth Circuit, the dismissal was affirmed.

## REASONS FOR GRANTING THE WRIT

### I. The decision below conflicts with this Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)

*Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) was a major decision of this Court. It invalidated a one percent minimum fee charged by lawyers in Fairfax County Virginia for title searches in residential real estate transactions. In *Goldfarb*, the minimum fee and its en-

<sup>2</sup> Class certification had been deferred pending the disposition of the jurisdictional issue, hence the classes were never certified.

forcement mechanism were declared to be a price fix, violative of federal anti-trust law.

Of great significance is the fact that *Goldfarb* in addition to providing major impetus for the abolition of mandatory minimum fee schedules for lawyers throughout the country, is also the first decision of this Court to recognize and declare that transactions in land, the most local commodity, have interstate commerce aspects, and to hold that when the relevant streams of interstate commerce are sufficiently (substantially) affected, purely local anti-competitive activities become subject to the anti-trust jurisdiction of the federal courts. In short, what *Goldfarb* said about land transactions, may ultimately turn out to be of far greater importance than what it said about legal services or even about anti-trust law.

Petitioners suggest, and will attempt to show, that in *Goldfarb*, this Court marked one boundary of an entirely new area of anti-trust jurisdiction to wit: the residential real estate market.

It is no news, that the scope of federal court jurisdiction under the Sherman and Clayton Acts is ultimately what this Court says that it is. The development of anti-trust jurisprudence in this court is marked by a process of re-definition to meet changing economic realities.

In the first anti-trust case, *United States v. E. C. Knight*, 156 U.S. 1 (1895), this court held that the production of

sugar, as opposed to its interstate distribution, was not subject to the anti-trust laws. Sixteen years later *Knight* was dealt a disabling blow by this Court in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). By 1948 this Court had decided *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) and the principle known as the "affectation doctrine" was recognized. The sharp dividing line between intrastate and interstate commerce for purposes of the acts was declared to be "functionally artificial" and of "slight importance if an adverse affect on interstate commerce follows." 334 U.S. 219, 220, 222 (1948).

In 1950 this Court unanimously decided the case of *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950). In that opinion, Mr. Justice Douglas, immediately after stating the case, which, like the present case, alleged price fixing by realtors in setting standard commissions for their services, remarks that no interstate commerce is involved. Since the relevant market was the District of Columbia, no interstate commerce connection was necessary to support Sherman jurisdiction, and the remark is pure dicta. Nevertheless, twenty-five years later, in *Goldfarb*, the Chief Justice, speaking for a unanimous court, including Justice Douglas, recognized no less than two streams of interstate commerce that are involved in land transactions:

1. the interstate flow of home mortgage funds, and



2. the out of state procurement of land title insurance

(*Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783)

Having defined the streams of commerce, in *Goldfarb* a conventional application of the affectation doctrine may be used to determine whether local conduct is subject to federal anti-trust control.

*Goldfarb* found a substantial effect upon commerce arising from the legal services in question based upon the relationship between a title search and a valid lien on the title to secure the financing of the purchase price. (*Id.*)

Unfortunately, the defendants, and both lower courts seized upon the specific analysis applied to the legal services in their relation to interstate commerce and applied the same exact analysis to the relation between brokerage services and interstate commerce in land transactions.

Petitioners respectfully suggest that this mechanical application is far too restrictive and overlooks the principle that lies at the very heart of the affectation of commerce doctrine, to-wit: that there must be "close scrutiny" of the particular facts of each situation. [*Cf. Santa Cruz Co. v. Labor Board*, 303 U.S. 453, 466-68 (1938).]

Simply because the services of a real estate broker are not absolutely necessary to assure "a lien on a valid title of the borrower," as the legal services were in *Goldfarb* (*Cf.* 421 U.S. 773, 784) does not mean that a combination to fix commissions for realtors has no substantial effect upon the interstate commerce aspects of land transactions in which realtors are involved. (Realtors play a part in an overwhelming majority of private home sales).

Ordinarily the role played by the realtor in the buy-sell transaction includes the following activities:

- 1) obtaining a listing from a potential seller;
- 2) locating a potential buyer from multiple listing services, advertising, national relocation services, etc.;
- 3) confecting a purchase agreement, usually contingent upon the buyer obtaining financing (a stream of interstate commerce) and title insurance (another stream of commerce);
- 4) often acting as escrow agent for the earnest money deposit;
- 5) often providing assistance and logistical support in moving the transaction toward the act of sale (*eg.* obtaining appraisals, acting as liaison between the parties, the homestead, the lawyers, etc.);

- 6) attending the act of sale;
- 7) accounting for deposits held in escrow, and
- 8) collecting at the act of sale a *vested* commission equal to six percent of the purchase price.

Petitioners admit that a real estate transaction can take place without a realtor being involved. Nevertheless given the complexity of a credit transaction in immovable property, the relative lack of sophistication of most consumers in the residential housing market, and the large sums of money involved, the services of a professional real estate broker are a practical if not a technical necessity.

In *Swift and Co. v. United States*, 196 U.S. 375, 398, this Court said, "commerce among the states is not a technical legal concept, but a practical one drawn from the course of business."

But that's not all.

The most substantial effect which the presence of a realtor exerts upon the transaction is his fee. The fixed commission, is an artificially inflated component — or at the very least a non-competitive element — of the purchase price of the house. As a matter of logic and common sense, either the seller adjusts the price to absorb the commission, or he must take less. Presuming

he decides to adjust the price, the buyer then must pay more for the house. What could exert a more direct affect upon such things as the amount of financing and the extent of the title insurance than a fixed non-competitive element of the price? In a strict, practical sense, the cost of the home is either going to be six percent higher, as a result of the realtor's participation, or else the seller will have to settle for less money.

The buyer who pays more is affected even worse. Since the realtor's commission comes "off the top" at the act of sale, the buyer must finance (through largely interstate sources) more of the purchase price; also, the VA, FHA or HUD must underwrite a larger loan than would be the case if there were no realtors and no commissions. What's more, this simple and logical observation has an almost startling mathematical and financial consequence.

It is a matter of absolute fact, albeit complicated arithmetic that given a standard 30 year home loan at a not uncommon  $9\frac{1}{2}\%$  *per annum* interest, for every dollar borrowed *three* dollars are repaid. Thus in amortizing the six percent commission, the buyer will eventually repay, over the life of the loan, an amount equal to roughly 18% of the original purchase price of his home.

One could argue that as opposed to financing the extra six percent, the buyer could simply make a larger down payment; but as a practical matter, the buyer is probably going to pay as much money on the down pay-



ment as he can afford, and since that down payment will ordinarily be the source of the realtor's commission it seems obvious that were the price of the house 6 percent less (assuming no realtor), the buyer would obtain an additional six percent equity in his new home by virtue of his original down payment. It is therefore reasonable to conclude that the artificial and non-competitive inflation of the purchase price of the home brought about by the realtor's commission is reflected in the amount financed through the lending institution. A similar argument can be made that since title insurance premiums are based upon purchase price, an artificial increase in such price, artificially inflates title insurance premiums. The same can be said about premiums, for fire and extended coverage, general liability (homeowner's coverage), and credit life insurance, all of which are generally procured through interstate sources.

Plaintiff submits that the following is clear:

1. The relationship between legal services and the interstate aspects of the land transaction is different from the relationship of brokerage services to such interstate aspects, therefore,
2. The mechanical attempt to apply *Goldfarb* by direct analogy is not necessary, and
3. A non-competitive element which artificially increases the price of homes can ex-

ert a substantial effect upon interstate commerce aspects of real estate transactions, and

4. *Goldfarb*, like most modern antitrust jurisprudence, requires nothing more than that a substantial effect be shown in order for jurisdiction to exist

Petitioners submit that the courts below erred in assuming that the exact analysis by which this Court found jurisdiction in *Goldfarb* is the only manner in which jurisdiction can be found.

## II. This Court should grant writs to resolve the numerous conflicting decisions in the trial and appellate courts throughout the country and provide a definitive decision in this area.

The following cases all involved the question of anti-trust jurisdiction over activities of realtors:

### I. Jurisdiction found

- A. *Sapp v. Jacobs*, 547 F.2d 1170 (7th Cir.) rev'g 408 F. Supp. 119 (S.D., Ill., 1977)
- B. *Oglesby and Barclift, Inc., v. Metro MLS, Inc., CCH Trade Cases*, paragraph 61,064 (E.D., Va., 1976)

- C. *United States v. Atlanta Real Estate Board*, 1972 Trade Reg. Rep., paragraph 73,825 (N.D., Ga. 1971)
- D. *United States v. Jack Foley Realty, Inc.*, 1977 Trade Reg. Rep., paragraph 61,678 (D. Md. 1977)
- E. *Gateway Assoc., Inc. v. Essex-Costello, Inc.*, 380 F. Supp. 1089 (N.D., Ill. 1974)
- F. *Mazur v. Behrens* (1974-1) Trade Reg. Rep., paragraph 75,070 (N.D., Ill. 1972)
- G. *Knowles v. Tuscaloosa Bd. of Realty, Inc.*, (unreported) No. 75-P-591 (N.D. Ala., 1975)
- H. *Wiles v. Tampa Board of Realty, Inc.*, (unreported) No. 74-136 Cir. T-K (N.D., Fla)
- I. *United States v. Long Island Bd. of Realtors, Inc.*, CCH Trade Cases, paragraph 74,068 (E.D. NY, 1972)

## II. Jurisdiction declined

- A. *Manion v. Jefferson Bd. of Realty*, (unreported) No. 73-2604 (E.D. La. 1974) Aff'd No. 74-1901 (5th Cir., 1975)
- B. *Income Realty and Mortgage, Inc. v. Denver Bd. of Realtors*, 578 F.2d 1326 (10th Cir. 1978)

- C. *Bryan v. Stillwater Bd. of Realtors*, 578 F.2d 1319 (10th Cir. 1977)
- D. *Marston v. Ann Arbor Property Mgt. Ass'n.*, 302 F. Supp. 1276 (E.D., Mich. 1969), aff'd 422 F.2d 836 (6th Cir., 1970)
- E. *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, 303 F. Supp. 502 (E.D. Mich., 1964)
- F. *Hill v. Art Rice Realty*, 66 F.R.D. 449, 511 (N.D. Ala. 1974), aff'd 511 F.2d 1400 (5th Cir., 1975)
- G. The instant case.

Although most of the cases are from district courts, affirmances and reversals with or without opinion have created a conflict between the fifth, sixth and tenth circuits on the one hand (finding no jurisdiction) and the seventh circuit whose reversal and remand of *Sapp v. Jacobs*, 547 F.2d 1170 (7th Cir.) unfortunately without opinion was followed by a *denial* of certiorari in this Court [See: 431 U.S. 968 (1977).]

It is very apparent that this is a lively issue which requires the sort of clarification only a decision by this Court can bring.

III. The question of whether consumers in the residential real estate market should have the advantages of price competition as a factor in their selection of a real estate agent is an important matter of anti-trust policy worthy of a decision by this Court.

Petitioners have previously mentioned that *Goldfarb* has significance in what this Court said about mandatory minimum fees for lawyers. But to extend the awesome power of the antitrust laws, into a brand new area (land transactions) and to reach only the activities of title lawyers whose minimum fee schedules were rarely enforced, by their professional associations would seem equivalent to driving a thumb tack with a sledge hammer.

Surely the Court perceives a far more severe restraint of trade involving the activities of realtors in the residential real property market. The existence of conflicting constructions of the intent of this Court in *Goldfarb* is itself an indication of the need for a determination of the issue of price competition among realtors.

Sales of homes nationally involve billions of dollars annually. Each year, millions of buyers and sellers enter the market. Societal mobility finds millions of families relocating every few years as jobs change and people transfer and are re-assigned. Despite the local nature of land, the market is national in scope.

A directive to all lower federal courts, either to regulate competition among realtors, or to ignore the lack of it is a matter worthy of the attention of this Court.

### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted:  
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RICHARD G. VINET



# **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_ day of March 1979 three copies of the Petition for Writ of Certiorari were hand delivered by undersigned counsel to Harry McCall, Jr., Esq., Chaffe, McCall, Phillips, Toler and Sarpy, 1500 1st National Bank of Commerce Building, New Orleans, Louisiana 70112, lead counsel for respondents. I further certify that all parties required to be served have been served.

NELSON, NELSON &  
LOMBARD, LTD.  
A Professional Law Corporation

\_\_\_\_\_  
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# **APPENDIX**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

JAMES JEFFERSON McLAIN, DOUGLAS ARTHUR  
NETTLETON, JR., RAYMOND JOSEPH MUNNA,  
IRVING HIRSCH KOCH, and all other parties similar-  
ly situated,

Plaintiffs,

versus

CA No. 75-3402

REAL ESTATE BOARD OF NEW ORLEANS, INC.,  
JEFFERSON BOARD OF REALTORS, INC., GER-  
TRUDE GARDNER, INC., LATTER AND BLUM,  
INC., WAGUESPACK AND PRATT, INC., STAN  
WEBER AND ASSOCIATES, INC., SANDRA, INC.,  
ISABELLE McLEOD d/b/a ISABELLE C. McLEOD,  
REALTORS, and all other parties similarly situated,  
Defendants.

\_\_\_\_\_  
COMPLAINT FOR INJUNCTIVE RELIEF  
AND TREBLE DAMAGES UNDER THE  
ANTI TRUST LAWS — CLASS ACTION  
\_\_\_\_\_

I

# **JURISDICTION**

This complaint is filed and this action is instituted  
under Section 1 of the Act of Congress of July 2, 1890,



2a

15 U.S.C. Section 1, as amended and supplemented, commonly known as the Sherman Act, and Section 4 and 16 of the Act of Congress of October 15, 1911, 15 U.S.C. Section 15 and 26, as amended and supplemented, commonly known as the Clayton Act. Exclusive jurisdiction is conferred pursuant to 15 U.S.C. Section 26.

II

The purposes of this action are (a) to recover treble money damages against defendants for injuring the business and property of plaintiffs and the class of persons they represent. Plaintiffs seek to represent buyers and sellers of single family and multiple family residences; which injury proximately resulted from defendants' violation of the anti trust laws of the United States; and (b) to restrain and enjoin defendants from continuing the illegal monopoly and the combinations, conspiracies and contracts in restraint of trade in commerce to the injury of the plaintiffs and the class of persons which they represent.

III

The defendants maintain offices, transact business and are each found within the Eastern District of Louisiana.

IV

PLAINTIFFS

1. Plaintiff, James Jefferson McLain, a resident of Orleans Parish, Louisiana, purchased a single family

3a

residence in Orleans Parish on or about August 17, 1972. Defendants provided real estate brokerage service in that transaction.

2. Plaintiff, Douglas Arthur Nettleton, Jr., a resident of Orleans Parish, Louisiana, purchased a single family residence in Orleans Parish on or about March, 1974. Defendants provided real estate brokerage service in that transaction.

3. Plaintiff, Irving Hirsch Koch, a resident of Orleans Parish, Louisiana, sold a single family residence in Orleans Parish on or about April, 1973. Defendants provided real estate brokerage service in that transaction. Plaintiff, Irving Hirsch Koch purchased a single family residence in Orleans Parish on or about September 1, 1974. Defendants provided real estate brokerage service in that transaction.

4. Plaintiff, Raymond Joseph Munna, a resident of Jefferson Parish, Louisiana, purchased a multifamily residence in Jefferson Parish, Louisiana on or about August 18, 1975. Defendants provided real estate brokerage service in that transaction.

V

CLASS ACTION ALLEGATIONS

Individual plaintiffs bring this action for damages on their own behalf and, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of all

similarly situated buyers and sellers of single and multiple family residences in Orleans and Jefferson Parishes, a class consisting of at least one thousand (1000) members. (a) The class is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the class; these questions predominate over any questions affecting only individual members; (c) the claims of plaintiffs are typical of the class; (d) plaintiffs will fairly and adequately protect the interest of the class; (e) the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole; (f) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

## VI

### DEFENDANTS

On information and belief, the Real Estate Board of New Orleans, Inc., (hereafter referred to as Orleans Board) is a corporation organized and existing under the laws of the State of Louisiana. It maintains offices and transacts business in the Eastern District of Louisiana. The Orleans Board is an association of licensed real estate brokers and provides certain services, trade marks, real estate computer facilities, and multiple listing facilities for its members. On information and belief, the Orleans Board is a member of Realtron, Inc. Licensed real estate brokers must belong to

one of the voluntary member associations of the National Association of Real Estate Boards, Inc., and of Realtron, Inc., in order to gain access to these services. On information and belief, the Orleans Board has certain rules and regulations and recommended practices.

## VII

On information and belief, the Jefferson Board of Realtors (hereafter referred to as Jefferson Board) is a corporation organized and existing under the laws of the State of Louisiana. The Jefferson Board maintains offices and transacts business in the Eastern District of Louisiana. The Jefferson Board is a voluntary membership organization consisting of licensed real estate brokers from the State of Louisiana. On information and belief, the Jefferson Board provided certain services for its members which are unavailable to non members.

## VIII

On information and belief:

(a) Defendant Gertrude Gardner, Inc., is a corporation organized in the State of Louisiana and domiciled in the Eastern District. Defendant Gertrude Gardner, Inc., acting through its duly authorized agents, provided real estate services to plaintiffs, including a brokerage fee.

(b) Latter and Blum, Inc., is a corporation organized

in the State of Louisiana and domiciled in the Eastern District. Defendant Latter and Blum, Inc., acting through its duly authorized agents, provided real estate brokerage services to plaintiffs, including a brokerage fee.

(c) Defendant Waguespack and Pratt, Inc., on information and belief, is a corporation organized under the laws of the State of Louisiana and domiciled in the Eastern District. Defendant Waguespack and Pratt, Inc., acting through its duly authorized agents, provided real estate brokerage services to plaintiffs, including a brokerage fee.

(d) Defendant Stan Weber and Associates, Inc., on information and belief, is a corporation organized under the laws of the State of Louisiana and domiciled in the Eastern District. Defendant Stan Weber and Associates, Inc., acting through its duly authorized agents, provided real estate brokerage service to plaintiffs, including a brokerage fee.

(e) Defendant Sandra, Inc., on information and belief, is a corporation organized under the laws of the State of Louisiana and domiciled in the Eastern District. Defendant Sandra, Inc., acting through its duly authorized agents, provided real estate brokerage services to plaintiffs, including a brokerage fee.

(f) Isabelle McLeod, Realtor d/b/a Isabelle C. McLeod Realtors, on information and belief, a sole pro-

prietorship transacting business in the Eastern District of Louisiana. Defendant Isabelle C. McLeod Realtors, acting through its duly authorized agents, provided real estate brokerage services to plaintiffs, including a brokerage fee.

(g) All Brokers who are Realtors and who transacted business in the Eastern District of Louisiana, including but not limited to members and associate members of the Orleans and Jefferson Board, and who were realtors at any time between the dates of October 31, 1971 and October 31, 1975; who on information and belief, have provided real estate brokerage services, including a brokerage fee.

## IX

### CLASS ACTION ALLEGATIONS

Pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, defendants represent the class of all realtors in Orleans and Jefferson Parish who at any time during the period from October 31, 1971 to October 31, 1975, were members of the Orleans Board and Jefferson Board; a class consisting of at least three hundred (300) members. (a) The class is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class, and these questions predominate over any questions affecting individual members; (c) the defenses of the representative parties are typical of the defenses of the class; (d) the representative parties will fairly and ade-



8a

quately protect the interests of the class; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

X

#### CO-CONSPIRATORS

Real estate brokers duly licensed to transact business in Orleans and Jefferson Parishes (who are not members of the Orleans and Jefferson Boards) on information and belief engage in the practices described herein but are named as co-conspirators.

XI

#### THE NATURE OF TRADE AND COMMERCE

The activities of the defendants are within the flow of interstate commerce and have an effect upon that commerce.

XII

Defendants account for a substantial proportion of real estate brokering services performed in connection with the purchase and sale of real estate in Greater New Orleans. Defendants assist in the purchase and sale of thousands of parcels of real estate in Greater New Orleans each year. Persons purchasing real estate in the Greater New Orleans area utilize the services of defendants in the purchase and sale of real estate.

9a

XIII

Many persons using the services of the defendants in connection with the purchase and sale of real estate are persons moving into and out of the Greater New Orleans area.

XIV

Defendants assist their clients in securing financing and insurance involved with the purchase of real estate in the Greater New Orleans area. Such financing and insurance are obtained from sources outside the State of Louisiana and move in interstate commerce into the State of Louisiana through the activities of the defendants.

XV

#### OFFENSE

Defendants have violated Section 1 of the Sherman Act and continue to engage in an unlawful combination and conspiracy to restrain interstate trade and commerce in the offering for sale and sale of real estate brokering services. Such unlawful combination and conspiracy are continuing and will continue unless this Court grants relief.

XVI

The aforesaid combination and conspiracy consist of a continuing agreement and concert of action between the defendants to fix, control, raise, and stabilize prices



10a

for the purchase and sale of real estate in a knowing, arbitrary, unreasonable and unlawful way.

XVII

In order to effect aforesaid combination and conspiracy the defendants have committed certain overt acts in furtherance of this combination and conspiracy:

(a) Engage in and encourage exchange of price information and fixed commission structures under the guise of associational meetings, educational formats, conventions, and trade publications.

(b) Share in, exchange, and artificially maintain fixed commissions and artificially-raised prices through trade usage, custom and patterns evidenced by multiple listing services and widespread fee splitting.

(c) Systematically withhold, suppress, and repress from buyers and sellers of real estate, including, by way of example:

(i) prices of competitive and comparable housing;

(ii) features and amenities of comparable housing;

(d) Promote and engage in fixed commissions for the purchase and sale of real estate.

11a

(e) Publish and disseminate printed matter which discourages price competition and restrains trade.

(f) Telephone and otherwise contact one another between meetings and discuss price fixing.

XVII

EFFECTS ON PLAINTIFFS

The aforesaid combination and conspiracy have the following effects, among others, on the individual plaintiffs and the class which they represent:

(a) Fees and commissions charged for real estate brokerage services have been raised, fixed, and maintained at an artificial and non competitive level;

(b) Prices of homes and multifamily residences have been artificially raised to buyers;

(c) Proceeds to sellers have been artificially reduced.

Plaintiffs and the class they represent have suffered and continue to suffer injury to their business and property.

XVIV

DAMAGES

As a consequence of the unlawful acts of the defendants, alleged above, the individual plaintiffs and the

class they represent have been injured in their business and property in the approximate amount of at least Sixty Million and No/100 (\$60,000,000.00) Dollars as of the date of filing of this complaint and are entitled under 15 U.S.C.A. Section 15 to treble damages of One Hundred Eighty Million and No/100 (\$180,000,000.00) Dollars.

## XV

All plaintiffs and the class they represent continue to incur injury to their business and property for as long as defendants persist in their unlawful conduct and are entitled under 15 U.S.C. Section 26 to injunctive relief against continued loss to property and business through defendants' persistence of the conspiracy under 15 U.S.C. Section 1.

WHEREFORE, plaintiffs pray:

1. That the Court adjudge and decree that the defendants have engaged in an unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in the sale of real estate brokering services in the State of Louisiana in violation of Section 1 of the Sherman Act.

2. That the defendants be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combination and conspiracy alleged above, or from engaging in any

other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

3. That the defendants be enjoined from agreeing to adhere to any schedule or percentage rates artificially restraining trade in the performance of real estate brokering services in the State of Louisiana.

4. That judgment be entered in favor of the individual plaintiffs and the class they represent and against defendants in a sum equal to treble the amount of damages suffered by said plaintiffs and the class they represent by reason of violations of the law herein complained of, together with the cost of this suit and reasonable attorneys fees; and

5. That plaintiffs have such further relief as the Court may deem to be just and proper.

Respectfully submitted,  
NELSON, NELSON, and  
LOMBARD, LTD.  
A Professional Law  
Corporation  
344 Camp Street, Suite 1100  
New Orleans, La. 70130  
Phone: 523-5893

14a

/s/ JOHN P. NELSON, JR.  
John P. Nelson, Jr.  
Trial Attorney  
/s/ PATRICIA SAIK  
Patricia Saik  
Trial Attorney  
/s/ RAYMOND JOSEPH MUNNA  
Raymond Joseph Munna

VERIFICATION

We, the undersigned, do hereby certify that we are the named plaintiffs in the cause entitled James Jefferson McLain, et al. vs. Real Estate Board of New Orleans, Inc., et al., who being duly deposed and sworn, do say that to our best knowledge and belief, the allegations therein stated are true and correct.

/s/ JAMES JEFFERSON McLAIN  
James Jefferson McLain  
/s/ DOUGLAS ARTHUR NETTLETON, JR.  
Douglas Arthur Nettleton, Jr.  
/s/ RAYMOND JOSEPH MUNNA  
Raymond Joseph Munna  
/s/ IRVING HIRSCH KOCH  
Irving Hirsch Koch

WITNESSES:

/s/ LOLITA BAHAM  
/s/ SHIRLEY LOVE

15a

Sworn to and subscribed before me,  
this 30 day of October 1975.

/s/ JOHN P. NEHN, JR.  
Notary Public

PLEASE SERVE:

Waguespack, Pratt, Inc.,  
through its registered agent:  
F. Waguespack, Jr.  
812 Perdido Street  
New Orleans, La. 70112

Gertrude Gardner, Inc.,  
through its registered agent:  
Gertrude Gardner  
7934 Maple Street  
New Orleans, La. 70118

Stan Weber and Associates, Inc.,  
through its registered agent:  
Stanley J. Weber, Jr.  
3841 Veterans Blvd.  
Metairie, La. 70002

Isabelle C. McLeod, Realtors,  
through:  
Isabelle C. McLeod  
7801 Maple Street  
New Orleans, La. 70118



Latter and Blum, Inc.,  
through its registered agent:  
Moise W. Dennerly  
505 Hibernia Bank Building  
New Orleans, La. 70112

Sandra, Inc., Realty,  
through its registered agent:  
Sandra F. Heiman  
7713 Maple Street  
New Orleans, La. 70118

Jefferson Board of Realtors, Inc.,  
through its registered agent:  
Charles J. Derbes, Jr.  
2015 Airline Highway  
Kenner, La. 70062

Real Estate Board of New Orleans, Inc.,  
through its registered agent:  
Edouard Carrere  
423 Carondelet Street  
New Orleans, La. 70130

James Jefferson McLAIN et al.

versus

REAL ESTATE BOARD OF  
NEW ORLEANS, INC., et al.

Civ. A. No. 75-3402.

United States District Court,  
E. D. Louisiana.

May 31, 1977.

# MEMORANDUM OPINION AND ORDER

BOYLE, District Judge.

This intended class action was brought on behalf of buyers and sellers of residential property in the New Orleans area who have used the services of real estate brokers. Plaintiffs allege that the defendant associations and realtors have conspired to fix and control the price of these services in violation of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 *et seq.*). They seek declaratory and injunctive relief as well as the recovery of treble damages.

A motion to dismiss the action was filed by defendants on the ground the challenged brokerage activities are wholly intrastate in nature and, since they neither occur in nor substantially affect interstate commerce,

are beyond the ambit of federal anti-trust prohibition.<sup>1</sup> We took the matter under submission and now, having considered the memoranda of counsel and the relevant documents of record, we conclude defendants' motion must be granted and the action dismissed.

Plaintiffs raised several arguments in initially opposing the motion, but we found these groundless save for the contention that brokers in this area participate in securing the financing and insurance necessary to consummate the sale/purchase of real estate.<sup>2</sup> We reasoned that, to the extent the financing and insurance aspects of real estate transactions may be shown to be interstate in nature, defendants' practical nexus therewith might satisfy the jurisdictional requirement of the Sherman Act pursuant to the Supreme Court holding in *Goldfarb v. Virginia State Bar*. See 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). Accordingly, the parties were advised in conference

<sup>1</sup> It is axiomatic that, in order for a federal action to be cognizable under the Sherman Act, the challenged activity must either be in interstate commerce or else have a substantial effect thereupon. See *Battle v. Liberty National Life Insurance Co.*, 493 F.2d 39, 47 (5 Cir. 1974) and cases cited therein.

<sup>2</sup> Plaintiffs had argued that many persons employing brokerage services are in the process of either moving into or out of the state, and that the alleged price-fixing activity by defendants is a *per se* Sherman Act violation which presumes that the jurisdictional requirement of the statute is satisfied. Yet, the mere interstate movement of a prospective buyer or seller — occurring either prior to or after the furnishing of brokerage services — hardly infuses such services with the requisite impact upon interstate commerce. Equally clear, in our view, is the fact that the *per se* rule of antitrust law relates solely to the merits of the claim and does not dispense with the threshold obligation of the claimant to establish subject matter jurisdiction.

that the issue at hand could be narrowed to the applicability of *Goldfarb*, and counsel were directed to engage in further discovery and submit additional memoranda addressed to this point. See Minute Entry of 9/3/76 [Record Doc. # 26].<sup>3</sup>

The *Goldfarb* case, like this one, involved allegations of price-fixing violative of the Sherman Act — there, through a minimum fee schedule prescribed by the defendant bar association and applied to legal services for title examinations relative to residential real estate transactions. The *Goldfarb* defendant likewise argued that since these legal services were performed intra-state and were essentially local in nature, they did not substantially affect interstate commerce within the

<sup>3</sup> Considering the results of this discovery and the supplemental briefs of counsel in addition to the pre-existing record, we reiterate the view that it is only *via* the *Goldfarb* analysis that this action may be said to arise under the Sherman Act. Thus rejected is argument by plaintiffs in their final memorandum that brokerage activities take place in interstate commerce by dint of a "national relocation service" in which two defendant realtors apparently participate. The service essentially involves an exchange of lists of brokers between realtors in different states. A participating realtor in one state will furnish to a client wishing to buy property in another the name of a broker therein who appears on the list, and receives a "referral fee" upon consummation of the sale by the out-of-state broker.

What plaintiffs fail to show in this approach is that the brokerage activity complained of herein occurs in or substantially affects interstate commerce. We do not construe their complaint to allege price-fixing with regard to broker referral fees, but only with regard to the fees which arise out of realtors' services in connection with the purchase or sale of real estate in the New Orleans area. We disregard the separate and independent participation of a broker in referring clients to out-of-state sources, therefore, and focus upon the possible interstate commerce effects of the in-state transaction by which a broker regularly earns his commission.

meaning of the Sherman Anti-Trust Act. The Supreme Court disagreed, however, noting that the transactions which created the need for the legal services in question were themselves interstate in character. Not only did the purchases involve financing through a significant amount of out-of-state funds, but a significant number of the loans were guaranteed by out-of-state government agencies. The Court went on to find that

[t]he necessary connection between the interstate transactions and . . . the minimum fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower . . . . Thus a title examination is an integral part of an interstate transaction . . . . Given the substantial volume of commerce involved, *and the inseparability of this particular legal service from the interstate aspects of real estate transactions* we conclude that interstate commerce has been sufficiently affected.

[Emphasis added].

95 S.Ct. at 2011-12.

It is clear that any inquiry based upon this decision must be twofold: 1) whether a "substantial" volume of interstate commerce is involved in the overall real estate transaction, and 2) whether the challenged activity

is an essential, integral part of the transaction and inseparable from its interstate aspects. Yet in this case — even were it assumed *arguendo*, as plaintiffs purport to establish, that many title insurance companies issuing policies on local residential property are situated outside of Louisiana and, moreover, that the businesses providing the necessary financing in local real estate purchases extend across state lines — the second criterion of *Goldfarb* remains unsatisfied. Those real estate financing officials who were deposed consistently testified that, while brokers customarily contact mortgage companies to solicit financing information on behalf of clients and on occasion even transport clients to the company offices, the actual financing process involves only the lender and borrower and the brokerage service is in no way an integral aspect thereof. *See, e.g.*, Dep. of Edmond G. Miranne, at 23-26 [Record Doc. # 53]; Dep. of Julian O. Hecker, Jr., at 32, 36-37 [Record Doc. # 55]. Stan Weber, Chairman of the Board of one of the defendant companies, essentially corroborated this testimony, stating that brokers might be asked by purchasers about the best financing available, but "cannot assist someone to secure financing." *See* Dep. of Stan Weber, at 40 [Record Doc. # 61]. With regard to title insurance, it also appears through deposition testimony that the actual procurement process takes place between the insurer and lending institution/purchaser, the only contact between an insurer and broker being that the former does provide information concerning its services to various realtors.



See Dep. of James W. Mills, Jr., generally and at 15-16, 18 [Record Doc. # 58].<sup>4</sup>

Plaintiffs correctly observe that a broker's commission usually is earned only after the buyer has been successful in securing financing<sup>5</sup> and that, as a practical matter, title insurance is a precondition to execution of the loan. Nonetheless, the inescapable conclusion to be

<sup>4</sup> In no way contradictory is the deposition testimony of two federal officials involved in the financing/insurance aspect of local real estate transactions. Angel Miranda, an area economist for the New Orleans office of the Department of Housing and Urban Development (HUD), testified as to various programs operative in this area whereby his agency, as well as the Fair Housing Administration (FHA), make mortgage insurance available to homebuyers; but he made no reference to broker activity in this connection. See Dep. of Angel Miranda [Record Doc. # 52]. Another HUD official, Meaher Turner, gave further testimony concerning these loan insurance programs, but spoke of brokers only to the extent their services have been used by HUD in the sale of repossessed property. See Dep. of Meaher P. Turner [Record Doc. # 59].

Moreover, counsel for both sides cite in their memoranda the deposition of Paul Greiner, a loan guaranty officer for the Veterans Administration (VA). The transcript of this particular testimony nowhere appears in the record. But it nevertheless is worth noting that the memorandum of plaintiffs' counsel confirms what defendants represent to have been Greiner's testimony, i.e., that real estate brokers play no role in the actual process during which the VA decides whether to guarantee a loan. See Plaintiffs' Supp. Memo in Opposition to Motion, at p. 11 [Record Doc. # 56]; Defendants' Third Supp. Memo in Support of Motion, at p. 7 [Record Doc. # 57].

<sup>5</sup> An apparent discrepancy exists between this statement and that of affiant-brokers Max Derbes, Jr. and Dalton L. Truax, Jr. to the effect that brokers "earn their commissions upon procuring a purchaser or seller . . . ." See Affidavits of Max Derbes, Jr. and Dalton L. Truax, Jr., att'd to Defendants' Motion [Record Doc. # 14]. Regardless of the exact point in time at which the commission accrues, however, the critical inquiry remains whether the service for which a broker earns his commission entails the financing and/or insurance of the transaction.

drawn from the evidence is that the participation of the broker in these (presumably interstate) phases of the real estate transaction is an incidental rather than indispensable occurrence in the transactional chain of events. We regard as still unrefuted the sworn statements of two brokers — filed in conjunction with defendants' motion — to the effect that the brokerage function is limited to bringing buyer and seller together and is essentially completed at that time. See Affidavits of Max Derbes, Jr. and Dalton L. Truax, Jr., att'd to Defendants' Motion [Record Doc. # 14].<sup>6</sup> Jurisdiction on the basis of *Goldfarb* is not established herein, and, in light of our ruling as to the other theories of interstate commerce involvement urged by plaintiffs, a cause of action under the Sherman Anti-Trust Act has not been stated.

For the foregoing reasons, defendants' motion to dismiss should be, and it is hereby, GRANTED, dismissing plaintiffs' action with costs.<sup>7</sup>

<sup>6</sup> In deposition testimony, Derbes clarified this reference to the brokerage function being "essentially" completed at the time a purchaser or seller is procured. In "many cases," he declared, the broker has done all he must do at this stage, although in some instances his continued assistance might be needed to "make sure everybody is performing the conditions of the contract." See Dep. of Max Derbes, Jr., at 58. As far as involvement in financing is concerned, however, Derbes emphatically denied that under the standard form agreement to purchase or sell a broker acquires the authority to obtain financing on behalf of his client. See *id.*, at 60-62.

<sup>7</sup> To the extent matters beyond the pleadings have been called to the court's attention, the motion, albeit styled a motion to dismiss for failure to state a claim, may be treated as one for summary judgment. See Rule 12(b), F.R. Civ.Pro. In fact, the motion also might properly be viewed as one for dismissal for lack of subject matter jurisdiction. In any event, no genuine issue of material fact appears to preclude judgment in defendants' favor pursuant to Rule 56.

James Jefferson McLAIN et al.,  
Plaintiffs-Appellants,

versus

REAL ESTATE BOARD OF  
NEW ORLEANS, INC., et al.,  
Defendants-Appellees.

No. 77-2423

United States Court of Appeals,  
Fifth Circuit.

Nov. 15, 1978.

Rehearing Denied Dec. 15, 1978.

Appeal from the United States District Court for the  
Eastern District of Louisiana.

Before GEWIN, GODBOLD and MORGAN, Circuit  
Judges.

LEWIS R. MORGAN, Circuit Judge:

This is an alleged class action brought on behalf of buyers and sellers of residential property in the New Orleans area. Claiming that the defendant realty associations and realtors have conspired to fix the prices of their services, the plaintiffs seek declaratory and injunctive relief as well as the recovery of treble damages.

In proceedings below, the defendants filed a motion to dismiss<sup>1</sup> asserting that the challenged brokerage activities were wholly intrastate in nature and thus fell beyond the reach of federal antitrust prohibitions. Initially, the district court withheld ruling on this motion and prescribed further discovery limited to the question of whether the facts of this case could be brought within *Goldfarb v. Virginia State Bar*, 421 U.S. 733, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1974). After further discovery, the court concluded that the brokerage activity at issue neither occurs in nor substantially affects interstate commerce; accordingly, the defendants' motion to dismiss was granted. On appeal, a multi-faceted challenge is raised against the lower court dismissal. Examining the various contentions in

<sup>1</sup> This case was brought under the Sherman Anti-Trust Act (15 U.S.C. §§ 1 et seq.). The precise motion before the court was styled a Rule 12(b)(6) motion to dismiss for failure to state a claim which was treated as a summary judgment to the extent matters outside the pleadings were considered. See Rule 12(b), F.R.Civ.Pro. The court also stated that its ruling might be viewed as a dismissal for lack of subject matter. As we discuss *infra*, the better practice is to cast as jurisdictional any dismissals based upon a failure to establish the requisite commerce clause relationship to the challenged activity. Thus, we view the proceedings below as what the Third Circuit might call a 12(b)(1) "factual attack." *Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 890-891 (3d Cir. 1977). Such an evaluation challenges more than the sufficiency of the allegations; it questions the existence of the underlying jurisdictional facts. "In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist." *Id.* at 891. See also *McNutt v. General Motors Accept. Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1935).



light of the particular averments of the pleadings, we agree with the lower court.

Our starting point is the recognition that jurisdiction under the Sherman Act extends to the furthest reaches of congressional power to regulate commerce. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558-559, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). The constitutional boundaries of congressional power vary according to the nature of the activity and regulatory scheme at issue. "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce." *McLeod v. Threlkeld*, 319 U.S. 491, 495, 63 S.Ct. 1248, 1250, 87 L.Ed. 1538 (1943). Under the Sherman Act, this vast, intractable expanse of federal jurisdiction is defined through a dual analysis. Jurisdiction is conferred if the acts complained of occur in the flow of commerce, or if these acts, though local in nature, substantially affect interstate commerce. *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 395 (5th Cir. 1974), cert. denied, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975); *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732, 739 n. 3 (9th Cir.), cert. denied, 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 645 (1954). With the "in commerce" test, the impact on interstate commerce is judged according to a qualitative standard — even insubstantial activity placed directly in the flow of commerce satisfies the jurisdictional requisite. *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 305, 5 L.Ed.2d 358 (1961). The "effect on commerce" test, however, requires a quan-

titative analysis of the substantiality of the impact on interstate commerce. *Mandeville Island Farms v. United States*, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948). Thus, activity imposing merely an "incidental" or "insubstantial" effect on commerce may fall beyond federal power. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 510, 60 S.Ct. 982, 84 L.Ed. 1311 (1940).

In the present case, the appellants argue that in today's world, real estate brokerage activities meet both tests of jurisdiction. We emphasize, though, that with both the "in commerce" and "effect on commerce" tests, we do not consider all of the ramifications that real estate sales have on nation-wide commerce. Instead, we must focus on the impact of the particular activities challenged in the appellants' complaint. The test is not that "the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." *Page v. Work*, 290 F.2d 323, 330 (9th Cir.), cert. denied, 368 U.S. 875, 82 S.Ct. 121, 7 L.Ed.2d 76 (1961). Examining the specific acts complained of in this case, we hold that they fail to establish jurisdiction under the "in commerce" test. The complaint alleges price-fixing of fees for the defendants' services in connection with sales of residential real estate in the New Orleans area. Such activity is entirely local in character. Real property is itself the quintessential local product. Further, the only sales activity mentioned in the pleadings occurs wholly intrastate. In such circumstances lower courts have consistently held that real estate brokerage does



not fall within the flow of interstate commerce. *Marston v. Ann Arbor Property Mgt. Ass'n*, 302 F.Supp. 1276, 1279-80 (E.D.Mich. 1969), *aff'd*, 422 F.2d 836 (6th Cir. 1970); *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, 303 F.Supp. 850 (E.D. Mich. 1964). Moreover, a Supreme Court decision considering real estate activities in Washington, D.C. noted, "(t)he fact that no interstate commerce is involved is not a barrier to this suit." *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 488, 70 S.Ct. 711, 714, 94 L.Ed. 1007 (1950). Within our circuit is the view that this dictum supports concluding that real estate brokers do not operate within the flow of commerce. *Hill v. Art Rice Realty Co.*, 66 F.R.D. 449, 454 (N.D. Ala. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1975). In denying jurisdiction under the "in commerce" test, we emphasize the limited scope of our holding. Here we are not considering pleadings that allege price fixing in appreciable sales of realty to out-of-state buyers. That might be a different matter.<sup>2</sup> Instead, this complaint asserts only that some individuals victimized by the defendants are persons moving in and out of the New Orleans area, "[t]he cases uniformly hold that the mere movement of individuals from one state to another in order to utilize particular services does not transfer those services into interstate services within the meaning of the Sherman Act." (cites omitted). *Diversified*

<sup>2</sup> Some courts have held sufficient allegations that the defendants advertised in interstate newspapers and that they sold realty to a substantial number of purchasers situated out-of-state. See, e.g., *United States v. Jack Foley Realty, Inc.*, 1977, Trade Reg.Rep. ¶ 61, 678, at 72, 790 (D.Md.1977). We suggest no view as to whether the addition of allegations like these would bring the defendants within the bounds of the Sherman Act.

*Brokerage Services, Inc. v. Greater Des Moines Bd. of Realtors*, 521 F.2d 1343, 1346 (8th Cir. 1975).

The more compelling jurisdictional argument advanced by the appellants is their contention that the controverted brokerage activities substantially affect interstate commerce. This question has spawned a significant conflict of authority. Cases finding an interstate commerce nexus include *United States v. Atlanta Real Estate Bd.* 1972 Trade Reg.Rep. ¶ 73, 825 (N.D.Ga. 1971); *Knowles v. Tuscaloosa Bd. of Realtors*, No. 75-P-591 (N.D.Ala.) (unreported); *Wiles v. Tampa Bd. of Realty, Inc.*, No. 74-136 Cir. T-K (M.D.Fla.) (unreported); *United States v. Jack Foley Realty, Inc.*, (1977) Trade Reg.Rep. (D.Md. 1977); *Gateway Assoc. Inc. v. Essex-Costello, Inc.*, 380 F.Supp. 1089, 1094 (N.D.Ill. 1974); *Mazur v. Behrens*, (1974-1) Trade Reg.Rep. ¶ 75, 070 (N.D.Ill. 1972).<sup>3</sup> Among the decisions rejecting the sufficiency of the interstate commerce element are *Manion v. Jefferson Bd. of Realtors*, No. 73-2604 (E.D. La. 1974), *aff'd*, No. 74-1901 (5th Cir. 1975); *Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors*, No. 77-2051, 578 F.2d 1326 (10th Cir. 1978) (opinion emphasized no *per se* restraint involved); *Bryan v. Stillwater Bd. of Realtors*, No. 77-1111, 578 F.2d 1319 (10th Cir. 1977); *Martson v. Ann Arbor Property Mgt. Ass'n*, 302 F.Supp. 1276 (E.D. Mich. 1969) *aff'd*, 422 F.2d 836

<sup>3</sup> See also *Sapp v. Jacobs*, 408 F.Supp. 119 (S.D.Ill.), *rev'd*, 547 F.2d 1170 (7th Cir. 1977); *Oglesby & Barclift, Inc. v. Metro MLS, Inc.*, CCH Trade Cases ¶ 61, 064 (E.D.Va.1976); *United States v. Metro MLS, Inc.*, CCH Trade Cases, ¶ 75, 311 (E.D.Va.1973). The appellants also cite various consent decrees involving real estate brokerage activities and the Sherman Act. E.g., *United States v. Long Island Bd. of Realtors, Inc.*, CCH Trade Cases, ¶ 74, 068 (E.D.N.Y.1972).

(6th Cir. 1970); *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, 303 F.Supp. 850 (E.D.Mich. 1964). Cf. *Hill v. Art Rice Realty*, 66 F.R.D. 449, 511 (N.D.Ala. 1974), *aff'd* 511 F.2d 1400 (5th Cir. 1975) (defendants' position had strong support). These diverse conclusions result in part from the varying factual gradations alleged. Instead of claiming to neatly reconcile these decisions though, we return to our polestar for analysis — the specific allegations of the complaint in this case. One paragraph says that many of the defendants' customers are "persons moving into and out of the Greater New Orleans area." For the same reason that such movement does not thrust intrastate activity "in commerce," courts have held that the passage of people across state lines to procure services does not mean that those services have a substantial effect on interstate commerce. E.g., *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, *supra*.<sup>4</sup>

The second and primary averment is that the defendants participate in securing home financing and title insurance "obtained from sources outside the State of Louisiana." Armed principally with this allegation, the appellants advance three arguments to overcome the district court's dismissal of their action. First, they contend that allegations of *per se* violations, such as price fixing, give rise to a presumption of a substantial effect on commerce. Next, appellants argue that even

<sup>4</sup> The interstate travel of customers is generally viewed as generating only "remote" or "incidental" consequences to interstate commerce; this movement of people evidently does not itself constitute a substantial source of interstate commerce. *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269, 271-272 (2d Cir. 1964).

without the benefit of this presumption, the facts and allegations of the present case are controlled by the Supreme Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). Finally, they urge that even if presently established facts are insufficient, they are entitled to a trial on the merits to more fully explore their jurisdictional allegations. With all three contentions, we must disagree.

Initially, we reject the argument that an allegation of a *per se* violation creates presumptive federal jurisdiction. As the lower court correctly observed, the *per se* rule bears solely on the merits of a claim by conclusively establishing the unreasonableness of a particular restraint. This principle does not eliminate the need for a jurisdictional determination of whether a restraint sufficiently impacts on commerce that is interstate. Supreme Court decisions have never said that a *per se* allegation reduces jurisdictional requisites. On the contrary, the Court has analyzed jurisdiction without differentiating between *per se* and rule of reason allegations. Compare *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-785, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) with *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464, 69 S.Ct. 714, 93 L.Ed. 805 (1949).<sup>5</sup>

<sup>5</sup> The genesis of the appellants' argument of presumptive jurisdiction probably lies in the theory's advocacy by Professor Areeda. See P. Areeda, *Antitrust Analysis* 122 (2d ed. 1974). Citing Professor Areeda, the Seventh Circuit enunciated a far reduced jurisdictional threshold for *per se* cases in an alternative holding in *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1260 (7th Cir.), cert. denied sub nom. *Modern Asphalt Paving & Const. Co. v. United States*,



In asserting that *per se* cases carry built-in jurisdiction, the appellants point to the seemingly abbreviated commerce clause analysis in *Burke v. Ford*, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967). The facts of that

423 U.S. 874, 96 S.Ct. 142, 46 L.Ed.2d 105 (1975); cert. denied, 423 U.S. 893, 96 S.Ct. 191, 46 L.Ed.2d 124 (1975) (separate appeals). Nonetheless, the opinion in *Finis P. Ernest* did require some interstate commerce, although the remodelled threshold was not clearly explicated. See also *Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors*, No. 77-2051, 578 F.2d 1326 (10 Cir. 1978) (Logan, J., concurring in part, dissenting in part). But see *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir. 1954). "[W]hen the 'affect' on commerce theory is presented, it is clearly a question of fact whether wholly intrastate activities affect interstate commerce in a manner proscribed by the Sherman Act. After this question is decided, then the *per se* doctrine may well apply." *Id.* at 748.

Compounding our conviction that the Supreme Court does not differentiate *per se* cases are two other concerns. As a matter of analysis, we perceive no jurisdictional basis for distinguishing *per se* and rule of reason allegations. In neither case can one presume that anticompetitive activity is underway. For example, the claim of a conspiracy, the central underpinning of a price-fix, may evaporate before hard evidence adduced at trial. Conversely, in both cases, if sufficiently stated allegations are proven, the disruption of free market forces will be established. Whether that disruption is effected by price fixing or unreasonable vertical territorial restraints, the ultimate consequences on the market are similar: supply will be constricted and prices artificially inflated. Thus the final impacts of restraints of trade would be inseparable in their ultimate effect on commerce.

Our second difficulty with a presumptive jurisdiction for *per se* cases is a practical one. To say the least, it can be difficult to ascertain whether particular allegations are classified under *per se* or rule of reason restraints. See *White Motor Co. v. United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963) (vertical restrictions not *per se*); but see *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967) (vertical restraints are *per se*); but see again *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (vertical restraints are not *per se*). The often elusive boundary separating the substantive analyses of *per se* and rule of reason restraints does not command a drastic jurisdictional differentiation.

case, however, do not suggest a *per se* short-cut through jurisdiction. Instead, the opinion follows a jurisdictional methodology reflected in such Supreme Court decisions as *Goldfarb v. Virginia State Bar*, *supra*; *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805 (1949); *Mandeville Island Farms v. American Crystal Sugar Co.*, 344 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).<sup>6</sup> These opinions have not relied upon data showing a demonstrable and deleterious impact upon interstate commerce. Rather, the analysis entails an identification of a substantial quantity of interstate commerce and then a determination of whether the allegedly restrained activity plays a "necessary" or "integral" role in that substantial commerce. For example, in *Burke v. Ford*, the controverted interstate commerce was liquor. Because every bottle of liquor sold in Oklahoma was manufactured out-of-state, both the substantiality and the interstate character of this commerce was manifest. The next step in the analysis is to connect this substantial interstate commerce to the alleged restraints. The plaintiffs in *Burke v. Ford* asserted that the liquor wholesalers in Oklahoma had conspired to effect horizontal

<sup>6</sup> In *United States v. Women's Sportswear Ass'n*, *supra*, the defendant stitching contractors were integral participants in the substantial interstate commerce in which 80% of the cloth was shipped in from out-of-state followed by 80% of the finished sportswear being marketed out of state. Similarly, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, *supra*, the defendant sugar refiners were a necessary component of the interstate commerce drawing sugar beet plants from California fields and leading to their ultimate sale as finished products in nation-wide markets. Elsewhere in this opinion, we briefly discuss the facts of *Goldfarb* and *Yellow Cab Co.*



territorial divisions. Because the entire liquor traffic was distributed through the wholesaler defendants, the alleged restraint operated in an activity that was clearly a "necessary" and "integral" part of interstate commerce. Thus, *Burke v. Ford* comports with a firmly entrenched mechanism for jurisdictional analysis and in no way imparts a reduced threshold for *per se* cases.

Rejecting the contention that *per se* allegations provide automatic jurisdiction, we turn to appellants' claim that this case is controlled by *Goldfarb v. Virginia State Bar, supra*. Underlying the Supreme Court's determination of jurisdiction in *Goldfarb* was the two-fold analysis that identifies substantial interstate commerce, then ascertains whether the allegedly restrained activity is "integral" or "necessary" to that commerce. In *Goldfarb*, the commerce was the interstate business of title insurance and home financing. The record shows that millions of out-of-state dollars flowed into Virginia as a consequence of these transactions; accordingly, the substantiality of this commerce was beyond question. The activity charged in *Goldfarb* was price-fixing by attorneys of their fees for title examinations. To connect the alleged restraint to the interstate commerce, the Supreme Court affirmed detailed district court findings which established

(i)n financing realty purchases lenders require, 'as a condition of making the loan, that the title to the property involved be examined . . . . Thus a title examination is an integral part of an interstate transaction . . . .'

421 U.S. at 784, 95 S.Ct. at 2011, *quoting* 355 F.Supp. at 494. By statute, title examinations could be performed only by attorneys. Therefore, the alleged price-fixing of fees for this service operated on an activity that was "integral" to interstate transactions of home financing and title insurance:

Given the substantial volume of commerce involved, and the *inseparability* of this particular legal service from the *interstate aspects* of real estate transactions, we conclude that interstate commerce has been sufficiently affected.

421 U.S. at 785, 95 S.Ct. at 2012 (emphasis added, *cites omitted*).

The lower court in the present case distinguished *Goldfarb* by finding that real estate brokerage constituted an incidental rather than integral part of the interstate commerce of title insurance and realty financing. Through ample discovery, the lower court heard essentially uncontradicted evidence that the brokerage function terminates when a home buyer and seller are brought together. This activity does not extend to the procurement of financing or title insurance. With respect to these latter transactions, the district court found that brokers occupy no more than an incidental, informational role. Therefore, unlike the attorneys in *Goldfarb* whose participation in title insurance was statutorily mandated, real estate brokers are neither necessary nor integral participants in the "interstate aspects" of realty financing and insurance.

This dichotomy between incidental and integral functions is based upon *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).<sup>7</sup> In *Yellow Cab*, the Supreme Court considered the relation of interstate commerce to two different cab operations. One service operated exclusively between rail terminals in Chicago carrying people from one station to the next to continue their interstate journeys. This taxi activity, and the trade restraint acting upon it, were held to be within the reach of the Sherman Act. A second cab service at issue was the general transportation of people within the Chicago area. Although this latter service frequently encompassed the movement of people to and from train stations, often to commence journeys out-of-state, the Supreme Court held that the general operation of cabs did not sufficiently implicate interstate commerce. "[W]hen local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation." 332 U.S. at 233, 67 S.Ct. at 1568. "In short, their relationship to interstate transit is only casual and incidental." *Id.* at 231, 67 S.Ct. at 1567. The distinction *Yellow Cab* draws between integral and incidental activities corresponds to the distinction between *Goldfarb* and the present case. Like the first cab operators in *Yellow Cab*, the attorneys in *Goldfarb* were invariable and indispensable com-

<sup>7</sup> The enduring vitality of *Yellow Cab* has been reaffirmed in subsequent Supreme Court decisions, including *Goldfarb*, 421 U.S. at 784, n. 13, 95 S. Ct. 2004.

ponents of interstate commerce. And, as with the second cab activity in *Yellow Cab*, real estate brokerage does not inherently comprehend the interstate aspects of their business. "To the taxicab driver" or the real estate broker, "it is just another local fare." *Id.* at 232, 67 S.Ct. at 1567.

We endorse the lower court's conclusion that *Goldfarb* does not govern this case. The factual determinations underlying the holding that real estate brokerage does not substantially affect interstate commerce must be upheld unless clearly erroneous. *United States v. Oregon Medical Society*, 343 U.S. 326, 338-339, 72 S.Ct. 690, 96 L.Ed. 978 (1952). Thus, our posture contrasts with *Goldfarb* in which the Supreme Court reviewed factual determinations in support of an "integral" role for attorneys.<sup>8</sup> In the present case, we find substantial evidence that real estate brokers occupy no more than an "incidental" role in interstate commerce. Therefore, jurisdiction is not established through analysis of *Goldfarb*.

Rejecting the appellants' theories of *per se* jurisdiction and *Goldfarb*, we come to their claim that they are entitled to a trial on the merits to more fully develop their jurisdictional assertions. For many courts, the

<sup>8</sup> The vital distinction is further illustrated in another antitrust context where, on analagous facts, two Supreme Court decisions diverged according to the trial court resolution of factual questions. Compare *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939) with *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954).



dazzling complexity of antitrust litigation rarely commends dismissal in advance of trial. See, e.g., *Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n*, 484 F.2d 751, 759 (7th Cir. 1973), cert. denied, 414 U.S. 1131, 94 S.Ct. 870, 38 L.Ed.2d 755 (1974). See also *Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 892-897 (3d Cir. 1977). Competing against this concern, however, is the reality that antitrust suits frequently entail enormous expense. Win, lose, or draw regarding the final outcome, the very fact of trial may result in crushing costs and hardships to the defendant. To balance both sides of the antitrust equation, this court authorizes pre-trial dismissal except "where the factual and jurisdictional issues are completely intermeshed . . ." *McBeath v. Inter-American Citizens for Decency Committee*, 374 F.2d 359, 363 (5th Cir.), cert. denied, 389 U.S. 896, 88 S.Ct. 216, 19 L.Ed.2d 214 (1967). If jurisdiction and the merits are inextricably bound, "the jurisdictional issues should be referred to the merits, for it is impossible to decide one without the other." *Id.* See also *Battle v. Liberty National Life Ins. Co.*, 493 F.2d 39, 47 (5th Cir. 1974), cert. denied, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975).<sup>9</sup>

<sup>9</sup> Technically speaking, the merits and jurisdiction could never be severed because interstate commerce is an element of both. The teaching of *Rosemound Sand & Gravel*, *infra*, however, is that if the issues necessarily determinative of jurisdiction can be isolated and explored through discovery, dismissal in advance of trial may be appropriate. The effective use of discovery is a crucial feature of this case. The Supreme Court has instructed that "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co. v. Trustees Rex Hospital*, 425 U.S. 738, 746-747, 96 S.Ct. 1853, 48 L.Ed.2d 338 (1976).

Applying this standard to the present case, we hold that pre-trial dismissal was proper. Here, the issues of jurisdiction could be readily separated from the merits. The substantiality of particular interstate commerce and the nature of the defendants' role in such commerce comprise one issue. A separate analytic concept is raised by the question of whether these defendants conspired to fix the price for their services. Confronting the discrete issue of the commerce nexus, the district court allowed the appellants months of discovery to develop their *Goldfarb* analogy, which was practically the sole jurisdictional argument proffered. The other interstate commerce theory to be derived from the pleadings, the movement of out-of-state home buyers into the New Orleans area, was correctly discarded as a matter of law. We therefore hold that it was not "impossible to decide the one without the other." In fact, the jurisdictional issue could be and was extricated from the merits, thoroughly aired in advance of trial, and correctly resolved by the district court. Compare *McBeath v. Inter-American Citizens for Decency Committee*, *supra*, with *Rosemound Sand & Gravel v. Lambert Sand & Gravel*, 469 F.2d 416 (5th Cir. 1972). Accordingly, we hold that pre-trial dismissal was warranted in this case.

With our endorsement of the district court's determination that this particular real estate activity neither occurs in nor substantially affects interstate commerce, we must ascertain the character of the adjudication to be rendered. The district court styled its judgment as a 12(b)(6) dismissal for failure to state a



claim which was treated as a summary judgment insofar as matters outside of the pleadings were considered. Additionally, though, the court said that "the motion might properly be viewed as one for dismissal for lack of subject matter jurisdiction. We hold that this latter characterization reflects the proper disposition of this case. Because the sufficiency of the commerce nexus is both a substantive element and a jurisdictional requisite for an antitrust action, there are diverse if not disparate viewpoints on the proper procedural vehicle for resolving dismissal motions. See generally *Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 890-897 (3d Cir. 1977). And yet, whether the vehicle is a 12(b)(6) motion on the merits or a 12(b)(1) jurisdictional attack, the analysis of interstate commerce is the same. *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 742 n. 1, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976). In *Rex Hospital*, the court utilized Rule 12(b)(6) to hold that particular allegations adequately asserted the necessary commerce nexus. In such a case, the merits are properly reached because, with the substantive law determination that interstate commerce is sufficiently implicated, the adequacy of the jurisdictional predicate is also established. A markedly different situation arises, however, in the present case as we hold that the necessary relationship to commerce is missing. Although this conclusion might be viewed as a summary dismissal on the merits of appellants' claim, it also means that we lack subject matter jurisdiction of this action. This latter determination that jurisdiction is wanting must displace any conclusion as to the sufficiency of the appellants' claim

because, where there is no jurisdiction, we do not reach the merits. E. g., *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934). "It must be fundamental that if a court is without jurisdiction of the subject matter it is without power to adjudicate and the case could be properly disposed of only by dismissal of the complaint for lack of jurisdiction." *Stewart v. United States*, 199 F.2d 517, 519 (7th Cir. 1952). Accordingly, we hold that the proper disposition of this action requires a dismissal for lack of jurisdiction. Cf. *Rosemound Sand & Gravel v. Lambert Sand & Gravel*, *supra*.

In conclusion, we speak to the appellants' argument that the full realization of congressional policies mandates expansive judicial construction of the commerce clause. As the appellants observe, the acceptance of commerce clause limitations is an acknowledgment that the federal government is powerless to remedy alleged wrongs. Juxtaposed against this acknowledgment, however, is the growing spirit of federalism manifested at all levels of judicial and legislative decisionmaking.<sup>10</sup> This momentum is fueled by the realization that state processes are available to combat the full gamut of wrong doing, often including alleged restraints of trade.

<sup>10</sup> "[A] state is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy . . . (cite omitted) but is itself a coordinate element in the system established by the Framers for governing our Federal Union." *National League of Cities v. Usery*, 426 U.S. 833, 849, 96 S.Ct. 2465, 2473, 49 L.Ed.2d 245 (1976). A similar conviction is expressed in the Revenue Sharing Act, 31 U.S.C. § 1221 et seq. See, e.g., S.Rep. No. 92-1050, 92 Cong., 2d Sess., pt. 8 (1972), 1972 U.S. Code Cong. & Admin. News at 3874, 3939.

Even in the absence of state remedy, federal power cannot be extended simply because some wrong might otherwise be uncorrected. It is axiomatic that legislative laws and policies cannot bend principles of constitutional dimensions. Thus, no matter how beneficial, the Sherman Act cannot be thrust past its commerce clause anchorage into the residual expanse of state and individual prerogative. Such a limitation of federal authority, whether requiring the dismissal of an anti-trust suit or the freeing of a criminal defendant, is a necessary concomitant of private freedoms. With this acceptance of the limits of judicial power, we hold that there is no jurisdiction to consider this action and therefore order the case

DISMISSED.

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UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 77-2423

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JAMES JEFFERSON McLAIN, ET AL.,  
Plaintiffs-Appellants,

versus

REAL ESTATE BOARD OF NEW ORLEANS, INC.,  
ET AL.,  
Defendants-Appellees.

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Appeal from the United States District Court for the  
Eastern District of Louisiana

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ON PETITION FOR REHEARING

(December 15, 1978)

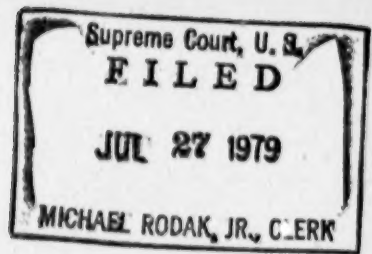
Before GEWIN, GODBOLD and MORGAN, Circuit  
Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ LOUIS R. MORGAN  
United States Circuit Judge



APPENDIX

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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1978

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No. 78-1501

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JAMES JEFFERSON McLAIN, ET AL.,  
Petitioners,

versus

REAL ESTATE BOARD OF NEW ORLEANS, INC., ET AL.,  
Respondents.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR CERTIORARI FILED MARCH 31, 1979  
CERTIORARI GRANTED MAY 14, 1979



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1978

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No. 78-1501

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JAMES JEFFERSON McLAIN, ET AL.,  
Petitioners,

versus

REAL ESTATE BOARD OF  
NEW ORLEANS, INC., ET AL.,  
Respondents.

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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In the United States District Court for the  
Eastern District of Louisiana

JAMES JEFFERSON McLAIN, ET AL.

versus CA NO. 75-3402(D)

REAL ESTATE BOARD OF  
NEW ORLEANS, ET AL

*Chronological List of Relevant Docket Entries:*

DATE	NO.	PROCEEDINGS
10-31-75	1	Plaintiffs' Complaint
12-12-75	11	Answer, Defendant Isabelle McLeod
12-17-75	12	Answer, Defendant Stan Weber
1- 5-76	13	Pre-trial order — Defendants relieved from filing answers until date to be fixed (E.J.B.)
3- 5-76	14	Defendants' Motion to Dismiss, Notice of Hearing on 3-31-76, with memo
3-25-76	15	On Plaintiffs' Motion, ORDERED: That Defendants' Motion to Dismiss be reset for 4-28-76 and that Plaintiffs reply to Defendants' Motion to Dis- miss by 4-7-76 (E.J.B.)
4- 8-76	16	Plaintiffs' Memorandum in Opposition to Motion to Dismiss
4-28-76	17	Minute entry: That Motion to Dismiss set for hearing 4-28-76 to be continued upon written motion of Defendants



- 4-27-76 18 Defendants' Motion for Continuance of Hearing on Motion to Dismiss, ORDERED: That Defendants' Motion to Dismiss is continued until 5-26-76
- 5-12-76 19 Minute entry: Hearing set for 5-26-76 is continued to 6-2-76 at 10:00 a.m.
- 5-14-76 20 Defendants' first supplemental memorandum in support of Motion to Dismiss
- 6- 2-76 21 Motion to Dismiss: Submitted
- 6-10-76 22 ORDER: That Plaintiffs have until 6-18-76 to file further memoranda
- 6-21-76 23 Plaintiffs' first supplemental memorandum in opposition to Motion to Dismiss
- 7- 2-76 24 Defendants' second Supplemental Memorandum in support of Motion to Dismiss
- 8-26-76 25 Minute Entry: Conference is set for 9-3-76 at 3 P.M. (E.I.B.)
- 9- 8-76 26 Minute Entry: Conference held 9-3-76; further conference to be held 10-13-76
- 9-14-76 27 Third Supplemental Memorandum in support of Defendants' Motion to Dismiss
- 10-15-76 28 Minute Entry: Conference held 10-13-76 adjourned to 1-14-77 at 4:00 P.M.
- 12-17-76 29 Plaintiffs' notice to take the deposition of Mr. M. P. Turner on 12-28-76 at 9:00 A.M.

- 12-17-76 30 Plaintiffs' notice of deposition of Gertrude Gardner Inc. on 12-27-76 at 2 P.M.
- 12-17-76 31 Plaintiffs' notice of deposition of Mr. J. Mills on 12-28-76 at 2:00 P.M.
- 12-17-76 32 Plaintiffs' notice of deposition of P. Griener on 12-28-76 at 3:00 P.M.
- 12-17-76 33 Plaintiffs' notice of deposition of A. V. Miranda on 12-28-76 at 11:00 A.M.
- 12-21-76 34 Plaintiffs' notice of deposition of Mr. J. Hecker on 12-30-76 at 11:00 A.M.
- 12-21-76 35 Plaintiffs' notice of deposition of Mr. E. G. Miranne on 1-6-77 at 9:30 A.M.
- 12-21-76 36 Plaintiffs' notice of deposition of Mr. Stan Weber on 12-29-76 at 3:30 P.M.
- 12-21-76 38 On Plaintiffs' Motion, ORDERED: That cutoff date for discovery is extended from 12-31-76 to 1-14-77.
- 12-22-76 39 Plaintiffs' first set of interrogatories.
- 12-23-76 41 Plaintiffs' notice of deposition of Mr. Max Derbes Jr. on 1-6-77 at 2:00 P.M.
- 12-28-76 43 Plaintiffs' amended notice of deposition of:
1. P. Turner, 1-3-77 at 9:00 A.M.
  2. A. Miranda, 1-3-77 at 11:00 A.M.
  3. J. Mills, 1-6-77 at 2:00 P.M.
  4. P. Griener, 1-4-77 at 10:00 A.M.
  5. A. T. Post, 1-10-77 at 2:00 P.M.
  6. S. Weber, 1-10-77 at 10:30 A.M.
  7. J. Hecker, 1-7-77 at 10:00 A.M.
  8. M. Derbes, 1-13-77 at 2:00 P.M.

- 1-18-77 50 Minute entry: Further conference held 1-14-77. Defendants are granted until 3-14-77 to reply to Plaintiffs' Memorandum.
- 1-20-77 52 Deposition of A. Miranda, taken 1-3-77
- 1-20-77 53 Deposition of E. G. Miranne, taken 1-6-77
- 2- 2-77 54 Letter: Moise Steeg to Jerry Meunier, Courtroom Deputy, Section D, re: Return on subpoena duces tecum to Carruth Mortgage Corporation
- 2-14-77 55 Deposition of J. O. Hecker taken 1-17-77
- 2-18-77 56 Plaintiffs' second Supplemental Memo in opposition to Defendants' Motion to Dismiss
- 3-11-77 57 Defendants' third Supplemental Memorandum in support of Motion to Dismiss
- 3-29-77 58 Deposition of J. W. Mills, Jr., taken 1-6-77
- 3-29-77 59 Deposition of M. P. Turner, taken 1-13-77
- 3-29-77 60 Deposition of M. Derbes, taken 1-12-77
- 3-29-77 61 Deposition of Stan Weber, taken 1-11-77
- 5-31-77 62 Memorandum Opinion and Order: Defendants' Motion to Dismiss is granted, Plaintiffs' action is dismissed
- 6-24-77 64 Plaintiffs' Notice of Appeal
- 8- 3-77 X Case forwarded to Court of Appeals

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

JAMES JEFFERSON McLAIN, et al.,  
Plaintiffs-Appellants,

versus No. 78-2324

REAL ESTATE BOARD OF  
NEW ORLEANS, INC., et al.,  
Defendants-Appellants.

*Chronological List of Relevant Docket Entries:*

DATE	PROCEEDINGS
11-15-78	Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit affirming dismissal of Plaintiffs' Action
12-15-78	Denial of panel re-hearing by United States Court of Appeals for the Fifth Circuit

IN THE  
SUPREME COURT OF THE UNITED STATES

JAMES JEFFERSON McLAIN, et al.,  
Plaintiffs-Petitioners,

versus No. 78-1501

REAL ESTATE BOARD OF  
NEW ORLEANS, INC., et al.,  
Defendants-Respondents.

*Chronological List of Relevant Docket Entries:*

DATE	PROCEEDINGS
3-14-79	Plaintiffs' application for extension of time to file Petition for Writ of Certiorari
3-15-79	ORDER: That Petitioner is granted until April 2, 1979 in which to file Petition for Writ of Certiorari
3-31-79	Plaintiffs' Petition for Writ of Certiorari
5-14-79	ORDER: "The Petition for a Writ of Certiorari is Granted."

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

JAMES JEFFERSON McLAIN, DOUGLAS ARTHUR  
NETTLETON, JR., RAYMOND JOSEPH MUNNA,  
IRVING HIRSCH KOCH, and all other parties  
similarly situated

Plaintiffs,

versus CA No. 75-3402(D)

REAL ESTATE BOARD OF NEW ORLEANS, INC.,  
JEFFERSON BOARD OF REALTORS, INC., GER-  
TRUDE GARDNER, INC., LATTER AND BLUM,  
INC., WAGUESPACK AND PRATT, INC., STAN  
WEBER AND ASSOCIATES, INC., SANDRA, INC.,  
ISABELLE C. McLEOD dba ISABELLE C. McLEOD,  
REALTORS, and all other parties similarly situated,  
Defendants.

Filed: Dec. 12, 1975

ANSWER

For the answer to the Complaint of the petitioner in the above entitled cause, Isabelle McLeod d/b/a Isabelle C. McLeod, Realtors, defendant above named, says:

I.

Defendant denies the allegations contained in Paragraph I for lack of sufficient information and belief.



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II.

Defendant denies the allegations of Paragraph II for lack of sufficient information and belief.

III.

Defendant admits the allegations of Paragraph III insofar as Isabelle McLeod d/b/a Isabelle C. McLeod, Realtors, transacts business and has an office in the Eastern District of Louisiana.

IV.

Defendant denies the allegations of Paragraph IV for lack of sufficient information and belief except that defendant, Isabelle McLeod d/b/a Isabelle C. McLeod, did provide real estate brokerage service in connection with a sole transaction for Douglas Arthur Nettleton, Jr.

V.

Defendant denies the allegations of Paragraph V.

VI.

Defendant denies the allegations of Paragraph VI except that the Real Estate Board of New Orleans, Inc. is a Louisiana corporation and provides certain services to its members.

VII.

Defendant denies the allegations of Paragraph VII for lack of sufficient information and belief.

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VIII.

Defendant denies the allegations of Paragraph VIII for lack of sufficient information and belief.

IX.

Defendant denies the allegations of Paragraph IX.

X.

Defendant denies the allegations of Paragraph X.

XI.

Defendant denies the allegations of Paragraph XI.

XII.

Defendant denies the allegations of Paragraph XII.

XIII.

Defendant denies the allegations of Paragraph XIII.

XIV.

Defendant denies the allegations of Paragraph XIV for lack of sufficient information and belief.

XV.

Defendant denies the allegations of Paragraph XV.

XVI.

Defendant denies the allegations of Paragraph XVI.

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XVII.

Defendant denies the allegations of Paragraph XVII.

XVIII.

Defendant denies the allegations of Paragraph XVIII.

XIX.

Defendant denies the allegations of Paragraph XIX.

XX.

Defendant denies the allegations of Paragraph XX.

WHEREFORE, defendant prays for:

I.

Judgment that the Complaint of the Petitioner be dismissed with prejudice and at plaintiffs' costs.

CHAFFE, McCALL,  
PHILLIPS, TOLER & SARPY

/s/ GERALD WASSERMAN  
Leon Sarpy  
Gerald Wasserman

(Certificate of Service Omitted)

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA  
NEW ORLEANS DIVISION

(Number and Title Omitted)

Filed: Dec. 17, 1975

ANSWER

For answer to the complaint of the petitioners in the above cause, Stan Weber & Associates, Inc., a defendant above named, says that:

I.

Defendant denies the allegations contained in paragraph I for lack of sufficient information and knowledge to justify a belief.

II.

Defendant denies the allegations contained in paragraph II for lack of sufficient information and knowledge to justify a belief.

III.

Defendant denies the allegations contained in paragraph III except to admit that defendant does do business and has an office in the Eastern District of Louisiana.

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IV.

Defendant denies the allegations contained in paragraph IV for lack of sufficient information and knowledge to justify a belief.

V.

Defendant denies the allegations contained in paragraph V.

VI.

Defendant denies the allegations contained in paragraph VI except that it does admit that the Real Estate Board of New Orleans, Inc. is a Louisiana corporation and provides certain services to its members.

VII.

Defendant denies the allegations contained in paragraph VII except to admit that the Jefferson Board of Realtors is a Louisiana corporation maintaining an office and transacting business in the Eastern District of Louisiana.

VIII.

Defendant denies the allegations contained in paragraph VIII for lack of sufficient information and knowledge to justify a belief except to admit its name and that it is a Louisiana corporation domiciled in the Eastern District of Louisiana where it does business.

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IX.

Defendant denies the allegations contained in paragraph IX.

X.

Defendant denies the allegations contained in paragraph X.

XI.

Defendant denies the allegations contained in paragraph XI.

XII.

Defendant denies the allegations contained in paragraph XII for lack of sufficient information and knowledge to justify a belief.

XIII.

Defendant denies the allegations contained in paragraph XIII for lack of sufficient information and knowledge to justify a belief.

XIV.

Defendant denies the allegations contained in paragraph XIV for lack of sufficient information and knowledge to justify a belief.

XV.

Defendant denies the allegations contained in paragraph XV.



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XVI.

Defendant denies the allegations contained in paragraph XVI.

XVII.

Defendant denies the allegations contained in paragraph XVII.

XVIII.

Defendant denies the allegations contained in paragraph XVIII.

XIX.

Defendant denies the allegations contained in paragraph XIX.

XX.

Defendant denies the allegations contained in paragraph XX.

WHEREFORE, defendant prays for judgment that the complaint of the petitioners be dismissed with prejudice and at their cost.

/s/ CHARLES F. BARBERA  
CHARLES F. BARBERA

(Certificate of Service Omitted)

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA  
NEW ORLEANS DIVISION

(Number and Title Omitted)

Filed: Jan. 5, 1976

PRE-TRIAL ORDER

Counsel for plaintiffs and counsel for defendants have presented to the Court the following agreed schedules and dates to orderly progress this cause; and, the Court finding same to be appropriate and reasonable;

IT IS HEREBY ORDERED that:

1. Any motion by a defendant to quash service or to object to the jurisdiction or venue of this Court shall be filed on or before sixty (60) days from the date hereof. Plaintiffs' reply, if any, to such motions, shall be filed within thirty (30) days of the service of said motions; and defendants shall file their response to plaintiffs' reply, if any, within twenty (20) days. Any such motions shall be noticed for hearing by the plaintiffs on a date convenient to the Court.

2. Any motion to be filed by a defendant under Rule 12(b) (other than those referred to in paragraph 1 above) or 12(e) shall be filed on or before thirty (30)

days following the date on which the Court shall have rendered its decision on all of the motions filed under paragraph 1 above. Any such motions shall be noticed for hearing by the plaintiffs on a date convenient to the Court.

3. On or before the date fixed for filing motions under paragraph 2 hereof, defendants will file and serve, if same are to be filed, interrogatories directed to plaintiffs as to the grounds for their pleadings under the provisions of Rule 11 of the Federal Rules of Civil Procedure; within sixty (60) days thereafter, plaintiffs will serve answers or objections to any such interrogatories; within thirty (30) days following receipt of answers to all interrogatories which plaintiffs must answer, defendants shall file all motions, if any are to be filed, contemplated by Rule 11 of the Federal Rules of Civil Procedure. Plaintiffs shall serve any reply to any such motions within twenty (20) days of the service of such motions and within ten (10) days thereafter defendants shall file any response to plaintiffs' reply.

4. On or before thirty (30) days following the last date on which this Court disposes of all motions filed pursuant to paragraphs 2 and 3 above, the parties to this action shall initiate discovery proceedings for the limited purpose of determining whether this action is to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, including depositions of plaintiffs and others, interrogatories and requests

for the production of documents. Such discovery may be conducted by the parties in one or more stages and shall be completed within one hundred eighty (180) days or such greater period as may be fixed by the Court.

5. On or before thirty (30) days following the date established in paragraph 4 above for the conclusion of discovery limited to questions involving whether this action may be maintained as a class action, all motions involving the class action question will be filed and served; within forty-five (45) days after service of any such motion the opposing parties will file their response thereto and movers shall have ten (10) days thereafter to reply.

6. All discovery, other than discovery permitted by paragraphs 3 and 4 above, shall be held in abeyance until further order of this Court following the determination of the class action questions as provided in paragraph 5 above; provided, however, the Court may authorize discovery upon a showing of good cause, such as the age or infirmity of a potential witness.

7. Designation of counsel to represent all counsel of the respective parties to receive and forward notices and notify the Court of responses and actions concerning pre-trial matters, etc., shall await the determination of the motions contemplated by paragraphs 1 and 5 above.



IT IS FURTHER ORDERED that all defendants are hereby relieved from filing answers until a date to be fixed by further order of this Court following its determination of all class action questions as provided in paragraph 5 above.

IT IS FURTHER ORDERED that deviations from or additions to this schedule will be permitted only by a further order of this Court.

New Orleans, Louisiana, this 5th day of January, 1976.

/s/ EDW. J. BOYLE, SR.  
UNITED STATES DISTRICT  
JUDGE

(Signature of Counsel Omitted)

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA  
NEW ORLEANS DIVISION

(Number and Title Omitted)

Filed: Mar. 5, 1976

### MOTION TO DISMISS

Defendants move the court to dismiss this action because the complaint fails to state a claim against defendants upon which relief can be granted on the ground that the court lacks jurisdiction for the following reasons:

First, that the alleged claim does not arise under any act of Congress regulating Commerce or protecting trade and Commerce against restraints and monopolies as provided under Title 28, Section 1337 of the United States Code, all as appears more fully from the affidavits of Max Derbes, Jr. and Dalton L. Truax, Jr., annexed hereto as part hereof and marked "Exhibits A & B" respectively for identification; and

Second, that the requisite diversity jurisdiction is lacking because it appears on the face of the complaint that the controversy is not between citizens of different states, but that all plaintiffs and defendants are citizens and residents of or domiciled and have their principal offices in the State of Louisiana.

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA  
NEW ORLEANS DIVISION

(Number and Title Omitted)

### MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

MAY IT PLEASE THE COURT:

This Memorandum is filed in support of defendants' Motion to Dismiss for want of subject matter jurisdiction. The complaint purports to state a claim "for injunctive relief and treble damages under the anti-trust



laws" against defendants who are realtors doing business within the jurisdiction of this Honorable Court. The jurisdictional allegations, set forth under the heading "The Nature of Trade and Commerce," are contained in paragraphs XI, XIII and XIV.

Paragraph XI alleges no facts, but merely asserts the conclusion that defendants' activities "are within the flow of interstate commerce and have an effect upon that commerce." Paragraph XIII alleges that many persons using defendants' services in connection with the purchase and sale of real estate "are persons moving into and out of the Greater New Orleans Area." Paragraph XIV alleges that defendants assist their clients in securing, financing and insurance involved with the purchase of real estate and that

"... such financing and insurance are obtained from sources outside the State of Louisiana and move in interstate commerce into the State of Louisiana through the activities of the defendants."

In fact, defendants do not engage in any interstate activities and the allegation as to financing and insurance is directly contradicted by the averments of the affidavits of Max J. Derbes, Jr. and Dalton L. Truax, Jr. annexed to defendants' Motion to Dismiss.

These affidavits recite that real estate brokers in the State of Louisiana are licensed by the State to perform

the function of real estate brokers in that State and no other. They further aver that there is no legal or other requirement that the sale or purchase of real estate in the State of Louisiana be made through a real estate broker and that the affiants has personal knowledge of sales made other than through such brokers. These affidavits further aver that the function of real estate brokers is to bring buyers and sellers together, that their commissions are earned when this has been done and that they have essentially completed their function when they have done so. It is finally averred that real estate brokers do not obtain and are not instrumental in obtaining financing of credit sales, save in a few special cases, nor are they connected with examination of titles in connection with the sale of real estate or financing of such sales.

It is submitted that defendants' activities as real estate brokers are clearly intrastate in nature and have no effect on interstate commerce. As such, they do not meet the criteria for application of federal anti-trust laws:

"... The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.

"... despite the increased thrust of federal commerce power as business operations become more interrelated and complex, the

courts have consistently required that in order for federal anti-trust jurisdiction to be sustained the effect on interstate commerce of an alleged antitrust violation in a local area must be direct and substantial, and not merely inconsequential, remote or fortuitous." (citing authorities) *Page v. Work*, 290 F.2d 323, 330, 332 (9th Cir. 1961).

*Page v. Work*, *supra*, was an action in behalf of a newspaper primarily engaged in publication of legal advertising for treble damages for violation of the anti-trust laws against a bureau representing newspaper owners in solicitation of legal advertising upon the ground that acts of the bureau caused alleged loss of publication of delinquent tax lists. Affirming a district court judgment of dismissal, the Court of Appeal concluded in its opinion as follows:

"[11] In our view, the language of Section 18 in no way indicates that Congress intended to apply the provisions of that Act to purely local activities wholly directed to a local intrastate market and relating to a product not in the flow of interstate commerce and where the effects on interstate activities in which the parties engage are insubstantial, inconsequential and fortuitous, if not nonexistent." at 333-4.

This requirement that the effect of the activity in question on interstate commerce be substantial and

direct, and not merely remote and incidental, lead to dismissal of anti-trust actions against realtors in *Marston v. Ann Arbor Property Managers Assn.*, 302 F. Supp. 1276 (D. C. Mich. 1969), *aff'd* 422 F.2d 836 (6th Cir. 1970), and *Cotillion Club, Inc. v. Detroit Real Estate Board*, 303 F. Supp. 850 (D. C. Mich. 1964). It is submitted that these decisions are precisely in point, are controlling and are dispositive of the plaintiffs' claims herein.

In *Marston*, *supra*, the alleged conspiracy was to fix the price level of rental apartments in Ann Arbor, Michigan and to control the supply of new apartments; jurisdiction was sought to be invoked under the provisions of Section 4 of the Clayton Act, as is sought herein. The district court dismissed the complaint for lack of jurisdiction, holding:

"[1,2] This court concludes that the provisions found within Section 1 of the Sherman Act have not been met and is fatal to plaintiffs' case. Section 1 of the Sherman Act provides that 'every contract, combination in the form of trust or other wise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal \* \* \*'. Unless interstate or foreign commerce has been directly and unreasonable restrained, there can be no violation of the Sherman Act and no private cause of action under the Clayton Act. The court is aware that a business of which the ultimate



object is the operation of intrastate activities, such as local apartment construction and rental, may make such a utilization of the channels of interstate trade and commerce that the business itself assumes some minor interstate character. However, the court does not find defendants conducting such a business. Defendants' business is not of such an interstate character as intended by the Act.

"It is clear from the complaint that the restraints alleged relate only to the rental of real estate in the Ann Arbor area. *This is local commerce and the competition allegedly restrained and interfered with is local in nature. There is no evidence that defendants' business has, or will have, a substantial adverse effect on interstate commerce.* (citing authorities) (Emphasis added.)

"[5] The actions of defendants are purely local in nature, restricted to the Ann Arbor area. Any effect their actions would have on interstate commerce is remote and inconsequential. There is no evidence of an intent to restrain interstate commerce, or a substantial and actual restraint of interstate commerce. Any conspiracy which only indirectly or incidentally affects and restrains interstate commerce is not within the purview of Section 1 of the Sherman Act. (cite omitted)

\* \* \*

"The 'Restraint of Trade', if any, is strictly a local problem. Plaintiffs should seek their remedy under state law. The court would not hesitate to entertain plaintiffs' action if Section 1 of the Sherman Act had been violated, but it has not. Plaintiffs have failed to satisfy the interstate commerce requirement. They have been unable to satisfactorily demonstrate that defendants' activities have occurred within the 'flow' of interstate commerce, or that such activities have had a direct and adverse effect on interstate commerce." at 1279-80.

The district court dismissal of the plaintiffs' action was appealed to the Court of Appeals for the Sixth Circuit, which affirmed in a *per curiam* opinion quoting from the district court opinion that the defendants' activities were local commerce and that the competition allegedly restrained and interfered with was local in nature, saying:

"We agree with the district judge that plaintiffs have not pleaded a Sherman Act case." at 837.

In *Cotillion Club, supra*, the alleged conspiracy was

" . . . to create and carry out restrictions and restraints of interstate trade and commerce in the purchase, sale, transfer, financing, and occupancy of real estate, including federally financed



*and insured real estate and house accommodations in the Detroit Metropolitan Area."* (Emphasis added)

The allegations to support federal jurisdiction were that some members of the defendant organizations received and transmitted information and listings to and from other states, that some such members made and filed applications, reports and other documents for transmittal to Washington, D.C. or other out of state offices of their various federal housing agencies and that some members of such organizations made investigations, appraisals and surveys of federally financed or insured Michigan real estate to be transmitted to other states.

The court noted that nowhere in the complaint was there any allegation as to the extent or substantiality of these alleged interstate activities nor any allegation of interstate activities of the defendant association, as distinguished from their members. The court further noted that the allegations of the complaint failed to relate the alleged interstate activities of these members of the defendant associations to the alleged restraints complained of in the complaint. The court then said:

"[1] Such incidental activities across state lines, by members of the defendants, do not establish the jurisdiction of this Court. The critical question is whether the alleged restraints are operative in interstate commerce,

and not whether the defendants' members engage, in the overall conduct of their business, in incidental activities across state lines.

\* \* \*

"[2] It is well settled that the Sherman Act was not designed to reach alleged restraints which are local in nature and do not substantially affect interstate commerce. . . .

\* \* \*

"It is clear from the complaint in this case that the restraints alleged relate only to the purchase and sale of real estate in the Detroit Metropolitan Area. It is competition for the purchase and sale of this real estate which is assertedly injured by the alleged restraints. This is local commerce and the competition allegedly restrained and interfered with is local in nature. If one assumes the allegations to be true, they fail to allege facts showing that the restraints substantially burden interstate commerce." at 853-4.

The court observed that the relevant market involved was the sale of real estate in the Detroit Metropolitan Area and that the members of the defendants were licensed to sell real estate only in the State of Michigan (just as the defendants herein are licensed to sell real estate only in the State of Louisiana) and that the sales related to real property which was entirely local (just as the sales herein complained of are

alleged to be in the Greater New Orleans Area, Complaint Pars. XII, XIV). As to the alleged filing of applications, reports and other documents in connection with federally insured real estate within the State of Michigan, the court said:

"... The nature of these applications, reports, and other documents does not appear. The effect which the alleged restraints have upon these 'applications, reports, and other documents' does not appear, nor does the extent of any such effect appear. There is no relationship established between the alleged restraint and the incidental activities involving mailings across state lines.

"The complexity of modern business leaves little room for contracts, or business transactions, which cannot be said in some degree to affect interstate commerce.

"[3] The effect on interstate commerce must be direct and not remote and must be the result of intent to restrain interstate commerce, or there must be substantial and actual restraint of interstate commerce; and any conspiracy which only indirectly or incidentally affects and restrains interstate commerce is not within the purview of this section." at 854.

In *Manion v. Jefferson Board of Realtors*, Civil Action No. 73-2604 of this Honorable Court, speaking through

Judge Gordon, dismissed a complaint virtually identical with that herein and this dismissal was affirmed by the Court of Appeal for the Fifth Circuit in a memorandum opinion in its docket, No. 74-1901. No holding to the contrary has been cited and it is accordingly quite clear that plaintiffs' complaint must be dismissed for lack of jurisdiction. A copy of the transcript of the hearing on the Motion to Dismiss in *Manion, supra*, is attached as Exhibit "C." Judge Gordon's reasons for granting the motion are stated on pages 23-6.

*Goldfarb v. Virginia State Bar*, \_\_\_\_ U.S. \_\_\_\_, 44 L.Ed.2d 572, 95 S.Ct. 2004 (1975), does not derogate from the holding in *Marston*, *Cotillion Club* or *Manion, supra*, being entirely distinguishable on its facts and issues. The charge in *Goldfarb, supra*, was that operation of the Virginia State Bar minimum fee schedule, as applied to fees for legal services relating to residential real estate transactions, constituted price-fixing in violation of Section 1 of the Sherman Act. The Supreme Court's determination that the schedule and its enforcement violated the Sherman Act rested upon a careful consideration and analysis of "the nature of the transactions at issue and the place legal services play in those transactions. . . ." at 582-3. The "transactions at issue" were various aspects of financing the purchase of real estate:

" . . . . petitioners . . . . contracted to buy a home in Fairfax County, Virginia. The financing agency required them to secure title



insurance; this required a title examination, . . . " at 578.

No question was raised as to the sale or purchase by the petitioners of the home in question; the opinions of the district court, the Court of Appeal and the Supreme Court are all silent on the question whether the plaintiffs' purchase was made through a real estate broker but, if so, this phase of the transaction was complete and had passed out of the picture.

In its careful definition of the "nature of the transactions at issue and the place legal services play in those transactions," the Supreme Court adverted to the district court finding that a significant portion of funds furnished for the purchase of homes in Fairfax County came from without the State of Virginia and that significant amounts of loans on Fairfax County real estate were guaranteed by the VA and HUD, both of which were headquartered in the District of Columbia, in consequence of which:

" . . . Thus in this class action the transactions which create the need for the particular legal services in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade provided by the minimum fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid

title of the borrower. In financing realty purchases lenders require, 'as a condition of making the loan, that the title to the property involved be examined . . . ' Thus a title examination is an integral part of an interstate transaction . . . " at 583.

By contrast, in the instant case

"The essential function of a Louisiana real estate broker consists of counselling purchasers or sellers of real estate situated in the State of Louisiana. Assisting them in establishing the price of properties and bringing about agreements to purchase and sell. Brokers earn their commissions upon procuring a purchaser or seller, as the case may be, and have essentially completed their function at that time." (affidavit of Max Derbes, Jr. and Dalton L. Truax, Jr., Par. VII.)

In contrast to the Supreme Court's finding of the "inseparability of this particular legal service from the interstate aspects of real transactions . . . " (at 583), which interstate aspects were the financing of the purchase of real estate, the role of the defendant real estate brokers in financing such purchases is neither integral nor inseparable. In *Goldfarb, supra*, the evidence reflected mortgage loans by out-of-state lenders in the State of Virginia of some Seventy-five Million Dollars for the years 1970 and 1971, VA loan guarantees in Fairfax County alone of One Hundred Five Million



Dollars in 1972 and HUD insurance of home mortgages in Fairfax County of Twenty-three Million Dollars in 1972. The role played by real estate brokers in Louisiana in financing credit sales is minimal:

"8. Real estate brokers do not obtain and are not instrumental in obtaining the financing of credit sales except in situations in which the Vendor accepts a note secured by a Vendor's Lien as part of the purchase price. Essentially, and in the overwhelming majority of cases, the obtaining of financing is handled by the purchaser directly with the lending institution.

"9. Real estate brokers are in no way connected with or participate in examination of titles in connection with the sale of real estate or financing of such sales." (affidavits of Max Derbes, Jr. and Dalton L. Truax, Jr.)

Paraphrasing the district court's opinion in *Marston*, *supra*:

"The actions of defendants are purely local in nature, restricted to the Greater New Orleans Area. Any effect their actions would have on interstate commerce is remote and inconsequential . . ."

The prior and separate nature of the services rendered by the defendants herein, in contrast to the serv-

ices at issue in *Goldfarb*, *supra*, appears clearly from footnote 13 to the Supreme Court's opinion reading as follows:

"The County Bar relies on *United States v Yellow Cab Co.* 332 US 218, 91 L Ed 2010, 67 S Ct 1560 (1947), to support its argument that the 'essentially local' legal services at issue here are beyond the Sherman Act. There we held, *inter alia*, that intrastate taxi trips that occurred at the start and finish of interstate rail travel were 'too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act.' 332 US, at 230, 91 L Ed 2010, 67 S Ct 1560. The ride to the railway station, we said, '[f]rom the standpoints of time and continuity . . . may be quite distinct and separate from the interstate journey.' *Id.*, at 232, 91 L. Ed. 2010, 67 S Ct 1560. Here, on the contrary, the legal services are coincidental with interstate real estate transactions in terms of time, and more important, in terms of continuity they are essential. Indeed, it would be more apt to compare the legal services here with a taxi trip between stations to change trains in the midst of an interstate journey. In *Yellow Cab* we held that such a trip was a part of the stream of commerce. *Id.*, at 228, 229, 91 L Ed 2010, 67 S Ct 1560." at 583.

The critical importance of this distinction becomes even clearer upon a reading of the entire paragraph from which the court quotes in its footnote:

"Here we believe that the common understanding is that a traveler intending to make interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. *What happens prior or subsequent to that rail journey, at least in the absence of special arrangement, is not a constituent part of the interstate movement.* The traveler has complete freedom to arrive at or leave the station by taxi cab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance. Taxi cab service is thus but one of the many that may be used. It is contracted for independently of the railroad journey and may be utilized whenever the traveler so desires. From the standpoint of time and continuity, the taxi cab trip may be quite distinct and separate from the interstate journey. To the taxi cab driver, it is just another local fare." at 2020-21 (Emphasis added.)

Paraphrasing the Supreme Court's language in *Yellow Cab, supra*:

"A title examination is an integral part of an interstate transaction and is inseparable from

the interstate aspects of real estate transactions. What happens prior or subsequent to the title examination, at least in the absence of some special arrangement, is not a constituent part of the interstate transaction. The purchaser has complete freedom to make his agreement to purchase through a real estate broker, through a friend or relative of the owner, through an attorney at law representing the owner or directly with the owner himself, whether a builder or an occupant. Purchasing through a real estate broker is thus but one of many means of contracting to buy real estate. It is contracted for independently of financing the purchase where such financing is necessary and is entirely unrelated to such financing. From the standpoints of time and continuity, the agreement to purchase is quite distinct and separate from subsequent financing arrangements."

That *Goldfarb, supra*, effected no change in the law as to the intrastate nature of real estate brokerage, but was decided on its special facts, is clear from the decision of the Court of Appeals for the Eighth Circuit in *Diversified Brokerage Services, Inc. v. Greater Des Moines Board of Realtors*, 521 F.2d 1343 (8th Cir. 1975). Rejecting the plaintiff's contention that Goldfarb was controlling, the court affirmed dismissal on jurisdictional grounds of an action for alleged violation of the Sherman Act in refusing to admit the plaintiffs to membership. The court pointed out that the plaintiffs



"... made no effort to present evidence that defendants' intrastate activities *substantially affect* interstate commerce and therefore come within the purview of the Sherman Act even though they are not interstate in character." (authorities cited) (Emphasis applied.) at 1345.

Noting that the only basis for the plaintiffs' contention that the defendants were engaged in interstate commerce within the meaning of the Sherman Act was a few transactions to which out-of-state persons were parties, the court cited *Yellow Cab's, supra*, holding that a cab ride at the beginning or ending of a railroad journey "did not become an integral part of the stream of commerce" (at 1346) so as to come within the Sherman Act and observed that the cases uniformly held that

"... the mere movement of individuals from one state to another in order to utilize particular services does not transform those services into interstate services within the meaning of the Sherman Act." (citing authorities) at 1346.

The court pointed out that in *Goldfarb, supra*, the Supreme Court ruled that title examinations were an integral part of the interstate transactions and noted the "substantial volume of commerce involved" (at 1346) and observed that the plaintiffs had made no such showing. Consequently,

"... on this record, the most that is shown by plaintiffs is some interstate movement of individuals. That is not enough to establish jurisdiction in this case." at 1347.

The "nexus with interstate commerce" which the court found in the financing of real estate purchases in *Goldfarb, supra*, is clearly lacking in defendants' purely local activity of bringing sellers and purchasers together and *Goldfarb, supra*, furnishes no precedents.

The doctrine that there must be a showing of direct and substantial effect on interstate commerce was recently affirmed by the Court of Appeals for the Fifth Circuit in *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416 (5th Cir. 1972). Suit had been brought therein by a gravel producer against three competitors alleging that they had combined to interfere with an output-requirements agreement which the plaintiff company had arranged with a large construction company. The District Court had dismissed the complaint for lack of jurisdiction and the Fifth Circuit affirmed. The court's opinion is instructive:

"... The complaint contains only the barest conclusory statements of jurisdiction and *Rosemound* has added little to shore up its initially weak position. The answers to its interrogatories clearly show that the defendants mine and sell sand and gravel only for Louisiana purchasers and that none of the

defendants products are shipped out of state or enter the flow of commerce. The depositions of Rosemound's partners establish that its business never got off the ground to any commercially recognizable extent. As found by the trial court, this failure of any party to have any interstate business disposes of the Clayton Act and Robinson-Patman Act claims. (citing authorities) While these intrastate activities could be found to violate the Sherman Act if they had a direct and substantial effect on interstate commerce, (citing authorities) evidence introduced below establish no such connection.

"If a combination could be shown to have existed here, its only purpose and effect would have been to interfere with the intrastate Louisiana Sand and Gravel business." at 418-19.

### CONCLUSION

As appears more fully from the foregoing discussion, there is clear authority for the proposition that the activities of real estate brokers such as defendants herein are purely local in nature and not subject to the Sherman and Clayton Acts. The allegation in paragraph XIV that defendants assist in securing financing and insurance involved with the purchase of real estate is controverted by the recitals of the affidavits of Messrs. Derbes and Triax and, as is more ful-

ly set forth hereinabove, financing and title insurance are entirely separate from the activities of real estate brokers. The conclusory allegations of paragraph XI that defendants' activities "are within the flow of interstate commerce and have an effect upon that commerce" are clearly insufficient to vest jurisdiction.

The complaint should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,  
CHAFFE, McCALL,  
PHILLIPS, TOLER &  
SARPY

/s/ HARRY McCALL, JR.  
Harry McCall, Jr.

(Names of Co-Counsel Omitted)

(Certificate of Service Omitted)



## DEFENDANTS' EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA  
NEW ORLEANS DIVISION

(Number and Title Omitted)

## AFFIDAVIT

STATE OF LOUISIANA:

PARISH OF ORLEANS:

BEFORE ME, the undersigned authority, personally came and appeared MAX DERBES, JR., who, upon first being duly sworn, did depose and say:

1. I am a resident of the Parish of St. Tammany, State of Louisiana.
2. I am engaged in the business of a real estate broker with offices in the Parish of Orleans. I am duly licensed as a broker by the State of Louisiana since 1954.
3. I am the first vice president of the Real Estate Board of New Orleans, Inc. and I have served on the Board of Directors of said organization for 7 years.
4. In such capacities, I have been and am familiar in considerable depth with the workings of the real estate market in the State of Louisiana.

5. The Broker's License issued to me by the State of Louisiana authorizes me to perform the functions of a real estate broker in that State and no other; all real estate brokers in the State of Louisiana are similarly licensed.

6. There is no legal or other sort of requirement that the sale or purchase of real estate within the State of Louisiana be made through a real estate broker and I know of my own knowledge that in fact sales have been and are made without the interposition of real estate brokers; examples of such sales are direct sales by individual owners, by builders, by friends or relatives or through attorneys at law.

7. The essential function of a Louisiana real estate broker consists of counseling purchasers or sellers of real estate situated in the State of Louisiana, assisting them in establishing the price of properties and bringing about agreements to purchase and sell. Brokers earn their commissions upon procuring a purchaser or seller, as the case may be, and have essentially completed their function at that time.

8. Real estate brokers do not obtain and are not instrumental in obtaining the financing of credit sales except in situations in which the Vendor accepts a note secured by a Vendor's Lien as part of the purchase price. Essentially, and in the overwhelming majority of cases, the obtaining of financing is handled by the purchaser directly with the lending institution.

9. Real estate brokers are in no way connected with or participate in examination of titles in connection with the sale of real estate or financing of such sales.

/s/ MAX J. DERBES, JR.  
MAX DERBES, JR.

(Jurat Omitted)

DEFENDANTS' EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA  
NEW ORLEANS DIVISION

(Number and Title Omitted)

AFFIDAVIT

STATE OF LOUISIANA:

PARISH OF ORLEANS:

BEFORE ME, the undersigned authority personally came and appeared, DALTON L. TRUAX, JR. who upon first being duly sworn, did depose and say:

1. I am a resident of the Parish of Jefferson, State of Louisiana.
2. I am engaged in the business of real estate broker with offices in the Parishes of Orleans, St. Tammany

and Jefferson. I am duly licensed as a broker by the State of Louisiana since 1960.

3. I am the Secretary of the Real Estate Board of New Orleans, Inc. and have served on the Board of Directors of said organization for five (5) years.

4. In such capacities I have been and am familiar in considerable depth with the workings of the real estate market in the State of Louisiana.

5. The Broker's License issued to me by the State of Louisiana authorizes me to perform the functions of a real estate broker in that State and no other; all real estate brokers in the State of Louisiana are similarly licensed.

6. There is no legal or other sort of requirement that the sale or purchase of real estate within the State of Louisiana be made through a real estate broker and I know of my own knowledge that in fact sales have been and are made without the interposition of real estate brokers; examples of such sales are direct sales by individual owners, by builders, by friends or relatives or through attorneys at law.

7. The essential function of a Louisiana real estate broker consists of counseling purchasers or sellers of real estate situated in the State of Louisiana, assisting them in establishing the price of properties and bringing about agreements to purchase and sell. Brokers



earn their commissions upon procuring a purchaser or seller, as the case may be, and have essentially completed their function at that time.

8. Real estate brokers do not obtain and are not instrumental in obtaining the financing of credit sales except in situations in which the Vendor accepts a note secured by a Vendor's Lien as part of the purchase price. Essentially, and in the overwhelming majority of cases, the obtaining of financing is handled by the purchaser directly with the lending institution.

9. Real estate brokers are in no way connected with or participate in examination of titles in connection with the sale of real estate or financing of such sales.

/s/ DALTON L. TRUAX, JR.  
DALTON L. TRUAX, JR.

(Jurat Omitted)

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Mar. 25, 1976

MOTION FOR EXTENSION OF TIME TO  
ANSWER DEFENDANTS' MOTION TO DISMISS

Plaintiffs herein request this Court to grant an extension of time to answer defendants' motion to dismiss, up through and including April 7, 1976, and to

continue the date for hearing this motion from March 31 to April 28, 1976, for the following reasons:

1. Pursuant to instructions from this Court, counsel for all parties agreed to a pretrial order containing a schedule for the orderly progress of this cause. This order was filed on January 5, 1976, and was signed as an order by this Court the same day.

2. Paragraph 1 of the pretrial order required that any motion by a defendant to quash service or object to the jurisdiction or venue of this Court be filed on or before sixty (60) days from January 5, 1976. Plaintiffs' reply to such motion shall be filed within thirty (30) days of the service of said motion. Defendants' reply, if any, is to be filed twenty (20) days thereafter.

3. Defendants filed a motion to dismiss for lack of subject matter jurisdiction with this Court on March 5, 1976, and plaintiffs received copies of this motion through letter dated March 8, 1976. Defendants noticed the motion for March 31, 1976.

4. Pursuant to the agreed timetable, plaintiffs are entitled to a thirty day time frame within which to reply after service of the motion or up through and including April 7, 1976.

5. Furthermore, pursuant to the pretrial order, plaintiffs bear the responsibility of noticing said motions for hearing.

6. Defendants, through letter to plaintiffs' counsel dated March 23, 1976, have suggested that in order to comply with the applicable time frames, that their motion originally noticed for hearing on March 31, 1976, be rescheduled for either April 28, 1976 or May 26, 1976.

Respectfully submitted,

NELSON, NELSON &  
LOMBARD, LTD.

/s/ PATRICIA SAIK  
Patricia Saik  
John P. Nelson, Jr.

#### ORDER

IT IS HEREBY ORDERED that defendants' motion to dismiss, which is set for hearing on March 31, 1976, be reset for April 28, 1976, and that plaintiffs' reply to defendants' motion to dismiss be filed by April 7, 1976.

New Orleans, Louisiana, this 25th day of March, 1976.

/s/ EDWARD J. BOYLE, SR.  
UNITED STATES DISTRICT  
JUDGE

(Certificate of Service Omitted)

## IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Apr. 8, 1976

### PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

#### I. *Background and Procedural Posture*

Plaintiffs, buyers and sellers of residential property in the greater New Orleans area, have alleged that two trade associations and their broker members (realtors) have conspired to fix the price of brokering services offered to prospective buyers and sellers of residential real property in the greater New Orleans area.

On January 5, 1976, counsel for all parties filed a proposed pretrial order to accommodate the complexity of this lawsuit and to establish an orderly procedural timetable. The proposed timetable became an order of this Honorable Court the same date. (See record, pretrial order signed by Honorable Edward J. Boyle on the 5th day of January, 1976.) This order precludes plaintiffs initiating discovery until all pretrial motions contemplated in paragraphs 1, 2 and 3 have been argued and disposed of by ruling. At that point, discovery is permitted only to determine whether this action is maintainable as a class action (see order, paragraph 4, page 3).



Plaintiffs have abided by this order and have initiated no discovery; thus plaintiffs must rely in large part on the jurisdictional allegations in their complaint to support their opposition to defendants' present motion to dismiss. Plaintiffs have, however, submitted several affidavits to support a showing that defendants' brokering activities, an integral part of the entire real estate transaction, takes place in interstate commerce and substantially affects that commerce (see complete discussion, *infra*).

Defendants have jointly moved to dismiss this Sherman Act<sup>1</sup> complaint on the basis that the brokering services which they dispense, or, in the case of the defendant boards who supervise, foster, aid, abet and educate, are neither within the flow of commerce nor affect interstate commerce.<sup>2</sup> Defendants substantiate this posture through two affidavits purporting that brokering services are wholly discrete from the panoply of actions involved in the purchase and sale of residential real property from beginning to end.

Plaintiffs offer the following memorandum to refute this position. To briefly summarize at the outset, it is plaintiffs' position that a price fix presumes satisfaction

<sup>1</sup> 15 U.S.C. 1 (1964).

<sup>2</sup> Generally speaking, under the antitrust laws, the interstate commerce element of the offense may be based on the fact that the acts complained of are within the flow of interstate commerce or that the activity substantially affects interstate commerce. *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F. 2d 732 (9 Cir. 1954).

of Sherman Act jurisdictional requirements. Should the Court find this position insufficient, plaintiffs will show that defendants' activities are an integral part of interstate commerce, that is, that defendants' brokering services cannot be divorced from the economic continuum of interstate activities necessary to culminate a real estate transaction. Not only do defendants service out-of-state buyers and sellers, but their work requires the use of telephone and mail communication across state lines. Further, their services include offering assistance to both procure loans from interstate lending sources and to obtain title insurance from out-of-state insurance carriers.

Although the purchase and sale of realty is localized to the extent that real property is by nature an immovable, the brokering activities can and do move in interstate commerce and have a substantial effect on that commerce. But again, even if the services include no more than bringing a buyer and seller together, this activity, because it is inextricably bound up with the entire buy/sell transaction, is sufficient to confer jurisdiction.

## II. Factual Summary

Before turning to a full discussion of applicable legal principles which firmly support a showing of subject matter jurisdiction here, plaintiffs must reemphasize and briefly explain each jurisdictional allegation contained in their complaint. Of course, for purposes of a

motion to dismiss, well-pleaded material allegations must be taken as true. See generally, 2A Moore's Federal Practice, paragraph 12.08. At this juncture, it cannot be fairly said that in a factually complex suit such as this the standard for dismissal has been met — i.e., that it appears to a certainty that plaintiffs are entitled to no relief under any state of facts which could be proved in support of the claim.

Generally, courts like the Fifth Circuit, see, e.g., *McBeath v. Interamerican Citizens for Decency Committee*, 374 F.2d 359 (5 Cir. 1967), will not permit dismissal for lack of jurisdiction where the jurisdictional issue is closely entwined with the substantive one of whether an anti-trust violation has actually occurred. Given these procedural precautions, plaintiffs submit that defendants' motion to dismiss should be viewed with particular caution.

Paragraph XI of plaintiffs' complaint alleges generally that defendants' activities are within the flow of interstate commerce and affect that commerce. This allegation is substantiated by more particularized allegations pertaining to the volume of business carried on, the interstate movement of customers, and finally, the interstate movement of financing and title insurance services.

A. Defendants Account For A Substantial Proportion Of Real Estate Brokering Services Performed In Connection With

The Purchase And Sale Of Real Estate In Greater New Orleans (Complaint, paragraph XII).

Absent discovery, plaintiffs are unable to provide the Court with the percentage of real estate transactions which take place through the services of the defendant realtors. Yet, even at this early juncture, defendants cannot deny that it is substantial. For example, for the fiscal year ending August 31, 1975, defendant Stan Weber & Associates, Inc. reported residential sales of \$56,340,345.00. *The Times-Picayune*, Sunday, October 19, 1975, front page classified section. Plaintiffs intend to prove that the other defendant realty companies likewise occupy a market position which in no way can be characterized as "inconsequential". Although defendants argue that no one is required by state law to use their services, the fact is that thousands of persons do turn to the realtor — a professional — to assist in the now sophisticated and oftentimes complicated buy/sell transaction.

B. Many Persons Using The Services Of The Defendants In Connection With The Purchase And Sale Of Real Estate Are Persons Moving Into And Out Of The Greater New Orleans Area.

One of the plaintiffs, Irving Koch, lived out-of-state at the time that he enlisted a realtor to assist in his purchase of residential property in the New Orleans



area (see attached affidavit of Koch). The brokering services rendered not only included actually locating suitable property, but the realtor utilized assisted Mrs. Koch with prices, marketing, information and financing.

Again, at this stage of the litigation, plaintiffs have not yet determined the actual percentage of transactions within the limitation period of this suit that involve out-of-state buyers and sellers. On information and belief, plaintiffs submit that this figure is sizeable. Taking a national statistic, in any one year, nearly 36 million people — about 18% of all those in the United States — change residences. About 6.6 million move across state lines. Cited in Austin, Real Estate Boards and Multiple Listing Systems As Restraints of Trade, 70 Columbia L. Rev. 1325, 1334, footnote 63. And support exists to show that defendants recognize and attempt to capitalize on this substantial interstate movement of persons. For instance, the *Times-Picayune* reported on March 28, 1976, section 5, page 19, that defendant Gertrude Gardner has opened a special Relocation Center designed to assist companies in relocating transferred personnel and to handle paper work involved in sales. Efforts like this just begin to demonstrate the importance that realtors play in securing and/or disposing of residential property for persons moving into and out of metropolitan New Orleans.

C. Defendants Assist Their Clients In Securing Financing And Insurance Involved With The Purchase Of Real Estate

In The Greater New Orleans Area. Such Financing And Insurance Are Obtained From Sources Outside The State Of Louisiana And Move In Interstate Commerce Into The State Of Louisiana Through The Activities Of The Defendants.

Both the United States Department of Housing and Urban Development and the Veterans Administration make substantial loan guarantees for the purchase of homes in metropolitan New Orleans (see attached affidavits of Paul Griener, Loan Guaranty Officer for the VA, and Angel Miranda, Area Economist for HUD). In 1975 alone, VA insured loans for the parishes of Jefferson and Orleans totaled over 55 million dollars. FHA loan operations for 1973 in Orleans Parish exceeded 6 million dollars. In short, there is no question that substantial amounts of financing necessary for the purchase of residential property flow into Louisiana from out-of-state sources.

Plaintiffs have alleged that realtors assist in procuring funds through interstate lending sources and in obtaining title insurance from out-of-state insurance carriers. Defendants have stated that brokers basically do not engage in either obtaining financing or title insurance (see defendants' affidavits of Max Derbes, Jr. and Dalton L. Truax, Jr.). But, at this point in the litigation

tion, important facts as yet are undeveloped.<sup>3</sup> Once discovery is initiated, a more complete picture of the realm of brokering services offered through defendants will be obtained and offered to support both jurisdictional and substantive Sherman Act requirements.

Finally, it is plaintiffs' position that given the allegation of a price fix, it is not a prerequisite to Sherman Act jurisdiction that defendants actually procure financing or title insurance. It is sufficient to show that defendants' brokering activities are an integral part of the entire economic transaction of a real estate purchase and sale and that their concerted activity disturbs the interstate flow of persons, financing, and insurance services necessary to complete the real estate transaction.

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<sup>3</sup> Despite the fact that opposing affidavits have been submitted and the Court will be considering some material outside the pleadings, plaintiffs strongly urge that dismissal on the basis of a motion for summary judgment would be improper. Not only are material facts in dispute, but other material facts are as yet undiscovered. "Rule 12(b)(6) requires that before a motion to dismiss may be treated as one for summary judgment the parties be given 'reasonable opportunity to present all materials made pertinent to such by Rule 56'". 6 Moore's Federal Practice, paragraph 56.02 [3], pages 56-32. Incidentally, at least one basis for distinguishing *Page v. Work*, 290 F. 2d 323 (9 Cir. 1961), a case on which defendants rely, is on procedural grounds. In *Page*, the parties in effect consented to a separate trial on the issue of jurisdiction and the court had before it a range of affidavits, oral testimony and the like. Since discovery here has not yet been initiated, plaintiffs are unable to offer the Court all pertinent evidence and in no way have consented to "a separate trial on the issue of jurisdiction".



III: *Plaintiffs Have Satisfied The Sherman Act Jurisdictional Requirements.*

Sherman Act jurisdiction requires first that the alleged restraint emanate from a "trade" and second, that the restrained commerce be "among the several states". See, 15 U.S.C. 1 (1964). Defendants have challenged the second requirement,<sup>4</sup> urging that the activity in which they engage begins and ends with bringing together a buyer and seller. In essence, they argue that their brokering services are purely local in nature and have only a remote or inconsequential effect on interstate commerce. It follows, therefore, that their activities, even if illegal, cannot be reached by federal prohibitions.

It must be remembered that when Congress exercised its commerce power under the Sherman Act, it utilized this power to its fullest extent. See, e.g., *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945). ("Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed' "). As such, intrastate activity is within the scope of federal regulatory power if that activity "exerts a substantial economic effect on inter-

<sup>4</sup> Indeed, questioning the first jurisdictional prerequisite would be near useless. In 1950, the U.S. Supreme Court clearly settled the issue of whether real estate brokering is a "trade" within the meaning of Section 1 of the Sherman Act. In *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950), the court refused to exempt the real estate industry from Sherman Act coverage on the basis that it was not a "trade".

state commerce." *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Alternately, if the violative acts occur within the flow of commerce, Sherman Act jurisdiction is found as well. See, *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F. 2d 732 (9 Cir. 1954), for an enunciation of these alternate bases for jurisdiction. These concepts will be discussed in detail, *infra*. But beforehand, plaintiffs address an important issue concerning jurisdictional requirements where a price fix is alleged.

A. Where A Price Fix Is Alleged, Since Proof Of Interstate Effects Need Not Be Proved To Establish The Substantive Offense, Courts Can Presume Satisfaction Of Sherman Act Jurisdictional Requirements.

The heart of plaintiffs' complaint alleges that defendants have combined and conspired together to fix, control, raise and stabilize the price of brokering services. (Complaint, paragraph XVI). Stated another way, the customers who utilize defendants' services do not enter a competitive market. Instead, purchasers and sellers entering the market are confronted with a fixed brokerage fee, notwithstanding the actual value of the services performed or the realtor who performs the service. On information and belief, plaintiffs submit that in the vast majority of residential transactions, the brokering fee remains constant.

Because plaintiffs have alleged a price fix conspiracy, it is unnecessary for plaintiffs to prove the

degree that the agreement affects interstate commerce. Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, or stabilizing the price of a commodity in interstate commerce is illegal *per se*. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Indeed, proof of the degree or effect that concerted activity has on interstate commerce is not a constitutional or jurisdictional prerequisite to the assertion of federal power. *Socony-Vacuum*, *supra*, at 485, note 59. In other words, the conduct itself, that is, the agreement to fix prices, is considered so harmful that additional proof of effects on interstate commerce is unnecessary. The adverse competitive effects are conclusively presumed from the mere existence of the conduct. See also, *Burke v. Ford*, 389 U.S. 320, 321-322 (1967). (Court presumed *per se* violation inevitably affected interstate commerce); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 240-41 (1948) (inevitable effect of price fix agreement is to reduce competition).<sup>5</sup>

<sup>5</sup> Although defendants rely on *Manion v. Jefferson Board of Realtors*, Civil Action No. 73-2604, for support that real estate brokering is a purely local activity that has only a remote effect on commerce, this case is inapposite here. Before ruling, Judge Gordon was twice informed that *Manion* had not alleged price-fixing (see *Manion* transcript, pp. 10, 12). Therefore, the court was not confronted with the legal effect of alleging a *per se* violation. The *Manion* case can also be distinguished on factual grounds. To support a jurisdictional showing, *Manion* apparently relied almost exclusively on a showing of incidental activities, such as purchasing supplies in interstate commerce (*Manion* transcript, p. 25). Plaintiffs here allege a far more substantial basis for interstate activity. It is also important to note that realtors themselves, the real links in the real estate transaction, were not named as defendants. As such, the court took no consideration of the actual brokering activities and the part these activities play in interstate commerce.



B. Defendants' Brokering Activities Take Place In Commerce And Affect Interstate Commerce.

Although plaintiffs contend it is not necessary to prove the interstate effects which defendants' alleged price-fixing conspiracy generates, plaintiffs can demonstrate that defendants' brokering activities take place in commerce, and are an integral part of that commerce.

Plaintiffs wish to stress that brokering services are an intangible<sup>6</sup> and as such, it becomes more difficult to conceptualize the movement of this product across state lines. It is partly because of this elusiveness of definition that plaintiffs demonstrate the interstate nature of the service by describing the specific acts of contact and communication in which the realtors engage. The conclusory description of "merely bringing a buyer and seller together" downplays the numerous contacts, many of which are interstate, which a realtor initiates and receives in his or her effort to successfully conclude a buy/sell agreement and thus earn a commission.

<sup>6</sup> There is no problem with the fact that it is "services" that constitute the economic continuum and affects interstate commerce. See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Southeastern Underwriters Association*, 322 U.S. 533, 546 (1944).

*Southeastern Underwriters*, supra at 539, is also important for the proposition that activities are in commerce where substantial quantities of documents, communication and money travel across state lines. Such activity is generated here by the fact that realtors service out-of-state buyers and sellers.

Practically speaking, a buyer cannot purchase a house without financing. As described above, millions of dollars flow from out-of-state to enable willing buyers to also become able ones. Similarly, a buyer wants a piece of land free of title defects. So does that buyer's bank or other lending institution. Taking the other side, a seller simply cannot sell without some guarantee that the purchaser will not later face a lawsuit by an heir or prior owner. The realtor is in effect caught in the middle of these demands and/or prerequisites to culminating a contract between a buyer and a seller. Even if the realtor does not participate in obtaining financing or insurance, which plaintiffs do not here concede, that realtor is no less an integral and oftentimes indispensable part of that entire economic process. It is on this basis that plaintiffs urge that defendants' brokering services clearly are intertwined with interstate commerce — the movement of persons, the flow of money, the establishment of communications, the struggle for business. A realtor earns a commission only upon the successful culmination of a number of transactions, many of which flow in commerce. Because the brokering service is thus such an integral part of the successful culmination of the buy/sell contract, a price-fixing conspiracy for the costs of brokering services substantially affects commerce for Sherman Act purposes.<sup>7</sup>

<sup>7</sup> Cf. *Mandeville Island Farms, Inc. v. American Crystal Sugar Company*, 344 U.S. 219 (1948). The court in *Mandeville Farms* set up a single formula for determining whether commerce was affected within the meaning of the Sherman Act: the relationship between the conduct complained of and the economic totality adversely affected by that conduct. Plaintiffs here request this Court to do the same.

Plaintiffs submit that the activities described above are sufficient to confer Sherman Act jurisdiction. The United States Supreme Court's recent pronouncement in *Goldfarb v. Va. State Bar*, — U.S. —, 44 L. Ed. 2d 572 (1975), provides sound precedent for upholding subject matter jurisdiction here. Chief Justice Burger (for a unanimous court) thoroughly answered the issue of whether the services performed by attorneys in examining titles in connection with financing the purchase of real estate are in interstate commerce or affect commerce. The court relied on district court findings of fact (see *Goldfarb v. Va. State Bar*, 355 F. Supp. 491, 494 (E.D. Va. 1973) and noted that a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia and significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing & Urban Development, both headquartered outside Virginia. *Goldfarb*, 44 L. Ed. 2d at 583.<sup>8</sup> Further, the court soundly rejected defendant's view that the legal services performed were wholly intrastate and could not therefore substantially affect commerce.

<sup>8</sup> Plaintiffs wish to point out that procedurally speaking the jurisdictional issue in *Goldfarb* was apparently reserved until the parties had ample time for pretrial discovery and a full presentation of evidence could be made at trial. At this point, plaintiffs are unable to offer the entire range of evidence, which they can and will produce after discovery has commenced. However, the allegations in the complaint, especially paragraph XIV, speak directly to the large volume of interstate loans and for purposes of this motion, should be taken as true.

"... the transactions which create the need for the particular legal services in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade provided by the minimum fee schedule is present because, in a practical sense,<sup>9</sup> title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower. In financing realty purchases lenders require 'as a condition of making the loan, that the title to the property involved be examined . . . ' Thus a title examination is an integral part of an interstate transaction.

\* \* \*

"Given the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions we conclude that interstate commerce has been sufficiently affected. See *Montague Co. v. Lowry*, 193 U.S. 38, 45-46 (1904); *U.S. vs. Women's Sportswear Ass'n*, 336 U.S. 460, 464-465 (1949)."

*Goldfarb*, 44 L. Ed. 2d at 583. The basis on which defendants herein seek to distinguish *Goldfarb* concerns whether brokering services are sufficiently entwined

<sup>9</sup> The court notes here that it is in a practical sense that we must view an affect on interstate commerce, citing *Swift and Co. v. United States*, 196 U.S. 375, 398 (1905) and *Mandeville Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 233 (1948).



with, inter alia, the interstate movement of funds which are necessary to finance the underlying purchase and sale transaction.

Plaintiffs strongly believe that pragmatism and the sophistication of today make impossible the severance of brokering services which defendants offer from the interstate aspects of a real estate transaction. For example, although it is true that the use of brokering services are not required by state law, one cannot ignore the fact that defendants actively solicit participation in the real estate transaction and that a substantial volume of real estate transactions occur through defendant realty companies.

Furthermore, it must be stressed again that realtors are acutely concerned with whether a potential buyer is able to obtain financing. Such financing is essential to the culmination of the sale. Absent financing, the realtor will earn no brokering commission. In addition, no commissions are earned without an unencumbered title, guaranteed by a title search and/or title insurance. Finally, the substantial movement of persons into and out of the greater New Orleans area who are seeking to either buy or sell residential property creates a healthy demand for brokering services. Plaintiffs submit that defendants' activities in matching buyers who are ready, willing and able to purchase, with sellers who have chosen to use professional services to facilitate the sale of their property, is in the words of the *Goldfarb* court, "an integral part of an interstate transaction".

*Diversified Brokerage Services, Inc. v. Greater Des Moines Board of Realtors*, 521 F. 2d 1343 (8 Cir. 1975), does not assist defendants here. The plaintiff in *Diversified Brokerage*, seeking admittance to the realty board, charged the board with a bottleneck boycott or a concerted refusal to trade. To support a jurisdictional showing, plaintiff showed that five real estate transactions (from a sample of 16% of the listings) involved persons residing out of state. Absolutely no other evidence of interstate activity was provided and, on this basis alone, the court upheld the district court's dismissal of the complaint. Three points which adequately distinguish the case from the instant one must be made.

First, and most importantly, the plaintiffs here do not rely solely on the interstate movement of persons to support a jurisdictional showing. Interstate movement of funds for loans and insurance are also present. This is particularly significant since the *Diversified Brokerage* court, though holding that the interstate movement of persons was not enough to confer subject matter jurisdiction, added a caveat:

"We emphasize the *limited nature of our holding*. Services affecting real estate, such as brokerage services, may, *depending on the evidence*, either constitute interstate activities or have no nexus with interstate commerce. (Citing *Goldfarb*, 95 S. Ct. at 2012). In the instant case, plaintiff presented extremely limited evidence and failed to show any interstate character to

these real estate transactions." *Diversified Brokerage*, supra, at 1347.

Secondly, the court noted that plaintiffs had been afforded full opportunity for discovery.<sup>10</sup> This, of course, is not the situation here.

Finally, unlike the plaintiff in *Diversified Brokerage*, who conceded in district court that the substantive and jurisdictional issues were not so intertwined as to preclude a jurisdictional ruling prior to trial on the merits, plaintiffs here strongly disagree and make no such concession at this early juncture.

To briefly summarize through a descriptive analogy, plaintiffs submit that the defendants are the chemists who mix the substantial interstate and intrastate elements of a real estate transaction to form the "sale" compound. The defendants cannot deny that their catalytic complicity affects the flow of interstate commerce.

#### IV. Summary and Conclusion

Plaintiffs submit that defendants' motion to dismiss should be denied based on the following:

<sup>10</sup> Suit was filed March 24, 1971, and was dismissed three years later, after plaintiffs had been accorded a full opportunity to present more facts. For a complete procedural explanation, see *Diversified Brokerage*, supra, at 1347, footnote 3.

1. Procedurally speaking, motions to dismiss are strongly disfavored, particularly in antitrust suits where the jurisdictional and substantive elements of proof come iningle. Because pretrial discovery has thus far been precluded pursuant to the pretrial order, plaintiffs have not yet had a full opportunity to substantiate the jurisdictional allegations in their complaint. But taken as true, as they must for purposes of this motion, the allegations support the requisite jurisdictional requirements.<sup>11</sup>

<sup>11</sup> Since the Court has before it materials outside the pleadings (i.e., various affidavits submitted by both plaintiffs and defendants), the motion to dismiss may be converted to one for summary judgment.

In support of plaintiffs' position that a summary judgment motion in this case should be denied, besides the comments in footnote 3, supra, plaintiffs offer the following:

"In a summary judgment situation, the court may consider admissions and facts conclusively established but all reasonable doubts touching the existence of a genuine issue as to material fact must be resolved against the movant." *United States v. Farmers Mutual Insurance Ass'n of Kiron, Iowa*, 288 F. 2d 560, 562 (8 Cir. 1961).

"The motion for summary judgment may be made by any party in any type of action. But by its nature summary judgment is apt to be ill-adapted to cases of a complex nature or to those that involve constitutional or other large public issues, which often need the full exploration of trial. A difficult question of law does not, however, warrant the denial of a motion for summary judgment, subject to the following important qualification: that the material factual issues are not in dispute and furnish an adequate basis for the application of the proper legal principles." 6 Moore's Federal Practice, paragraph 56.15 [1-0], p. 56-398.

Plaintiffs submit that where, as here, the case itself is complex, the depth and range of the brokering services rendered are in dispute, and the parties have not yet commenced discovery, defendants' motion should be denied.



2. Because plaintiffs have alleged a price-fixing conspiracy, once it is demonstrated that defendants' activities occur in commerce, the adverse effect on interstate commerce follows as a matter of law. At least part of defendants' brokering activities cross state lines, and it can be presumed that interstate commerce is affected thereby.

3. Even viewing defendants' brokering activities as wholly intrastate ones, these activities cannot practically be divorced from the interstate movement of conventional and government financing, title insurance services and the movement of buyers and sellers into the greater New Orleans area. The realtor cannot earn a commission unless the buyer has financing and the seller produces marketable title. As such, the realtor's services depend on and affect the interstate flow of both services and people.

Based on the foregoing memorandum, plaintiffs request this Court to deny defendants' motion to dismiss.

Respectfully submitted,

NELSON, NELSON &  
LOMBARD, LTD.  
A Professional Law Corporation

/s/ PATRICIA SAIK  
Patricia Saik, Trial Attorney  
John P. Nelson, Jr.,  
Trial Attorney

(Certificate of Service Omitted)

STATE OF LOUISIANA  
PARISH OF ORLEANS

BE IT KNOWN, that on the 7th day of April, 1976, before me, Notary, duly commissioned in the Parish of Orleans and therein residing, personally came and appeared:

IRVING HIRSCH KOCH

who first being sworn did depose and say:

That he is a resident of the Parish of Orleans, of age, and married and resides at 4141 State Street Drive, New Orleans, Louisiana;

That he is a named plaintiff in Civil Action No. 75-3402 entitled James Jefferson McLain vs. New Orleans Real Estate Board, et. al.;

That prior to moving to New Orleans he and his wife were residents of Dayton, Ohio;

That he purchased residential real estate in the City of New Orleans through the assistance and services of a Realtor member of the New Orleans Real Estate Board;

That in procuring his residential real estate, his wife, Susan Goldstein Koch, made several trips to New Orleans to search for suitable homes prior to moving to New Orleans in 1970;

That on these trips and pursuant thereto a real estate broker personally or through an authorized agent assisted her with prices, marketing, information, and financing.

THUS DONE AND SAID BEFORE ME, Notary, on the 7th day of April, 1976, in my office in Orleans Parish before the undersigned competent witnesses after due reading of the whole.

/s/ IRVING H. KOCH  
IRVING HIRSCH KOCH

(Jurat and Witnesses Omitted)

*AFFIDAVIT*

STATE OF LOUISIANA  
PARISH OF ORLEANS

I, PAUL GRIENER, Loan Guaranty Officer for the Loan Guaranty Division of the Veterans Administration, which administers all V.A. programs in the State of Louisiana, do hereby declare that the loan guaranties for the Parish of Jefferson and the Parish of Orleans, from 1973 through 1975, as well as a summation of total loan guaranties from 1945 through December, 1975, are accurately presented in Schedule A which is attached. These figures are based on our records and I

feel that they accurately represent V.A. loan guaranties during the applicable period.

New Orleans, Louisiana, this 2nd day of April, 1976.

/s/ PAUL GRIENER  
PAUL GRIENER

I have signed Schedule 1 to indicate its authenticity.

/s/ PAUL GRIENER  
PAUL GRIENER

WITNESSES

/s/ IRVING H. KOCH  
/s/ MARGARET SAUCHON

STATE OF LOUISIANA  
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, duly commissioned and qualified within and for the State and Parish aforesaid, personally came and appeared IRVING H. KOCH, who being by me first duly sworn, did depose and say:

That he was a witness, along with Margaret Souchon to the above and foregoing instrument; that he saw



Paul Griener sign the same in his presence and that of the other witness, and knows of his own knowledge that the said parties executed said instrument of their own free will and accord, for the uses, purposes and benefits therein expressed.

IN WITNESS WHEREOF, the said appearer has executed this acknowledgment in my presence and in the presence of the undersigned competent witnesses on this 2d day of April, 1976.

/s/ IRVING H. KOCH  
IRVING H. KOCH

WITNESSES:

/s/ SHIRLEY LOVE

/s/ MATILE B. GOLDBERG

/s/ MICHAEL A. DENNER  
NOTARY PUBLIC

SCHEDULE A

V.A. INSURED LOANS (LOAN GUARANTIES)

APPROX. 1945 - DEC. 1975:

JEFFERSON:	24,706 Homes \$423,813,120.00
ORLEANS:	21,209 Homes \$296,379,717.00

1972 — NOT AVAILABLE

1973:

JEFFERSON:	1066 Homes \$27,157,118.00
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ORLEANS:	807 Homes \$19,132,060.00
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1974:

JEFFERSON:	978 Homes \$26,804,480.00
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ORLEANS:	710 Homes \$19,128,685.00
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1975:

JEFFERSON:	1096 Homes \$33,333,820.00
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ORLEANS:	674 Homes \$20,126,700.00
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COMPUTER STATS FROM:

New Orleans Regional Office of V.A.  
Loan Guaranty Division

Paul A. Griener  
Loan Guaranty Officer  
Veterans Administration  
April 2, 1976

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

MINUTE ENTRY

Filed: Apr. 28, 1976

CAUSE

SHERMAN ACT & CLAYTON ACT  
UNLAWFUL CONSPIRACY TO RESTRAIN INTER-  
STATE TRADE & COMMERCE IN THE OFFERING  
FOR SALE AND SALE OF REAL ESTATE BROKER-  
ING SERVICES.

WEDNESDAY, APRIL 28, 1976 10:00 A.M.  
(M & O Cont'd 3/25/76)

MOTION OF DEFENDANTS, REAL ESTATE  
BOARD OF NEW ORLEANS, INC., ET AL, TO DIS-  
MISS.

Motion to be continued on written motion.

DATE OF ENTRY: APR. 28, 1976

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Apr. 27, 1976

MOTION AND ORDER

Now into Court through their undersigned counsel come Defendants herein, and on suggesting to the Court that the pre-trial order entered by the Court and approved by counsel for the Plaintiffs and Defendants on 5 January 1976 provides in Paragraph 1 that any motion by Defendants to quash service or to object to the jurisdiction or venue of this Court shall be filed on or before sixty days from the date hereof; Plaintiffs' reply shall be filed within thirty days of service of said motion; and Defendants' response shall be filed within twenty days; and on further suggesting to the Court that Defendants filed a motion to dismiss for lack of jurisdiction on 5 March 1976; and on further suggesting that on Plaintiffs' motion, this Court granted an extension of time to allow Plaintiffs through 7 April 1976 to answer Defendants' motion to dismiss, which answer was filed on or about 7 April 1976; and on further suggesting to the Court that by the same motion, Plaintiffs requested and obtained a continuance of the hearing on said motion to dismiss to 28 April 1976; and on further suggesting to the Court that under the schedule set out in the pre-trial order and referred to hereinabove, Defendants' reply to Plaintiffs' answer would be due on the day of or the day before said hear-



ing; and on further suggesting to the Court that the parties hereto have agreed to a continuance of the hearing on Defendants' motion to dismiss to 26 May 1976, and to an amendment of Paragraph 1 of the pre-trial order to extend the time within which Defendants may reply to Plaintiffs' answer to the motion to dismiss through 14 May 1976, Defendants move this Honorable Court to enter an order amending Paragraph 1 of the pre-trial order in conformity with the foregoing and continuing the hearing on Defendants' motion to dismiss to 26 May 1976 at 10:00 a.m. or as soon thereafter as counsel may be heard.

CHAFFE, McCALL,  
PHILLIPS, TOLER &  
SARPY

/s/ HARRY McCALL, JR.  
Harry McCall, Jr.  
1500 First Nat'l Bank of  
Commerce Bldg.  
New Orleans, La. 70112  
(529-3121)

#### ORDER

IT IS HEREBY ORDERED that Defendants' motion to dismiss, which is set for hearing on 28 April 1976, be reset for 26 May 1976, and that Defendants' reply to Plaintiffs' answer to the motion to dismiss be filed by 14 May 1976.

New Orleans, Louisiana, this 28th day of April, 1976.

/s/ EDW. J. BOYLE, SR.  
UNITED STATES DISTRICT  
JUDGE

(Certificate of Service Omitted)

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY  
BOYLE, J:

(Filed: May 12, 1976)

IT IS ORDERED BY THE COURT that the following motions presently fixed for hearing on Wednesday, May 26, 1976 at 10:00 A.M. be, and the same are hereby continued to Wednesday, June 2, 1976 at 10:00 A.M.

\* \* \* \*

C.A. 75-3402 — JAMES JEFFERSON McLAIN, ET AL  
v. REAL ESTATE BOARD OF NEW ORLEANS, INC.,  
ET AL

ATTORNEYS: John P. Nelson, Jr., Esq., and  
Ms. Patricia Saik, and  
Raymond J. Munna, Esq.  
Ms. Cynthia Samuel

Arthur L. Ballin, Esq., and  
 Frank C. Dudenhefer, Esq.  
 Edward F. Wegmann, Esq., and  
 F. P. Westenberger, Esq.  
 Harry S. Redmon, Jr., Esq., and  
 Rutledge Clement, Jr., Esq.  
 Leon Sarpy, Esq., and  
 Gerald Wasserman, Esq.  
 Charles F. Barbera, Esq.

\* \* \* \*

/s/ EDW. J. BOYLE, SR.  
 UNITED STATES DISTRICT  
 JUDGE

IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: June 2, 1976

MINUTE ENTRY

CAUSE

SHERMAN ACT & CLAYTON ACT  
 UNLAWFUL CONSPIRACY TO RESTRAIN INTER-  
 STATE TRADE & COMMERCE IN THE OFFERING  
 FOR SALE AND SALE OF REAL ESTATE BROKER-  
 ING SERVICES.

WEDNESDAY, JUNE 2, 1976

MOTION OF DEFENDANTS, REAL ESTATE  
 BOARD OF NEW ORLEANS, INC., ET AL, TO DIS-  
 MISS.

Argument

Plaintiff has 10 days to submit supplemental  
 memoranda, with unreported cases, etc. Defendant has  
 10 days thereafter to respond.

SUBMITTED.

IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: June 10, 1976

MOTION FOR EXTENSION OF TIME

Plaintiffs herein respectfully request an extension of  
 time in which to file a supplemental memorandum in  
 opposition to defendants' motion to dismiss based on  
 the following:

1. On June 2, 1976, this Court heard oral argument  
 on defendants' motion to dismiss for lack of subject  
 matter jurisdiction.



2. At the conclusion of the argument, plaintiff was given ten days in which to file supplemental memorandum.

3. Plaintiffs' counsel has obtained copies of three orders in private antitrust cases brought pursuant to Section 1 of the Sherman Act against real estate boards and/or realtors wherein the courts denied defendants' motion to dismiss for lack of jurisdiction. Copies of these orders are attached hereto.

4. These orders do not contain written reasons for the decision and plaintiffs' counsel has requested through the respective offices of the clerk of court that copies of the complaint, any amended complaints, and plaintiffs' memorandum in opposition to defendants' motion to dismiss in all three cases be sent to plaintiffs' counsel.

5. Since the requested pleadings should arrive on or about the same time plaintiffs' memorandum is due, i.e., June 14, 1976, plaintiffs request that the time for filing the memorandum be extended to June 18, 1976.

6. Plaintiffs' counsel has contacted Mr. Harry McCall, Jr., lead counsel for defendants, and has been authorized to state that he has no objection to an extension of time.

Respectfully submitted,  
NELSON, NELSON &  
LOMBARD, LTD.

A Professional Law Corporation

/s/ PATRICIA SAIK  
Patricia Saik  
\_\_\_\_\_

### ORDER

IT IS ORDERED that the time in which plaintiffs are to file their supplemental memorandum is hereby extended from June 14 to June 18, 1976.

Dated: June 10, 1976

/s/ EDW. J. BOYLE, SR.  
UNITED STATES DISTRICT  
JUDGE

(Certificate of Service Omitted)

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Aug. 26, 1976

Minute Entry  
August 25, 1976  
BOYLE, J.

A conference will be held in this case on Friday, September 3, 1976, at 3:00 P.M.

John P. Nelson, Jr., Esq.  
 Ms. Patricia Saik  
 Arthur L. Ballin, Esq.  
 Charles F. Barbera, Esq.  
 Moise W. Dennery, Esq.  
 Harry McCall, Jr., Esq.  
 Roy L. Price, Esq.  
 Harry S. Redmon, Jr., Esq.  
 Ms. Cynthia Samuel  
 Leon Sarpy, Esq.  
 Edward F. Wegmann, Esq.

DATE OF ENTRY: AUG. 26, 1976.

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Sept. 8, 1976

Minute Entry  
 September 3, 1976  
 BOYLE, J.

A conference was held this day.

Present: Ms. Patricia Saik  
 For Plaintiffs

Arthur L. Ballin, Esq.  
 For Real Estate Board of  
 New Orleans, Inc.

Rutledge Clement, Jr., Esq.  
 For Gertrude Gardner, Inc.

Edward F. Wegmann, Esq.  
 For Waguespack, Pratt, Inc.

Charles F. Barbera, Esq.  
 For Stan Weber and Associates, Inc.

Ms. Cynthia Samuel  
 For Sandra, Inc.

Harry McCall, Jr., Esq.  
 For Isabelle C. McLeod

Not Present:

Roy L. Price, Esq.  
 For Jefferson Board of  
 Realtors, Inc.

Moise Dennery, Esq.  
 For Latter & Blum, Inc.

Mr. Ballin declared he would represent Roy L. Price, Esq., and Mr. McCall that he would represent Moise Dennery, Esq.



Under submission is defendants' motion to dismiss for lack of jurisdiction, premised upon the failure of plaintiffs to satisfy the interstate commerce requirement of the antitrust law under which their action proceeds.

The Court advised counsel that it appears plaintiffs may satisfy said jurisdictional requirement only by bringing the facts of this case within the parameters of the Supreme Court's holding in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). It is recognized, however, that further discovery is needed on the issue of *Goldfarb's* applicability *sub judice*. More specifically, such discovery should determine whether, in the first place, there is the requisite interdependence between the brokerage activity of defendants and the financing and/or insuring of real estate transactions in the New Orleans area and, secondly, whether there is a substantial involvement of interstate commerce in such real estate transactions *via* the financing and/or insurance aspects thereof.

The parties shall confer with regard to the procedure of discovery along these lines. Following such discussions, another conference will be held in this matter at 4:00 P.M. on Wednesday, October 13, 1976.

EJB

Roy L. Price, Esq.

Moise Dennery, Esq.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Dec. 17, 1976

## NOTICE OF DEPOSITION

TO: (Names of Counsel Omitted)

PLEASE TAKE NOTICE that at 9:00 a.m. on the 28th day of December, 1976, at the law offices of Nelson, Nelson & Lombard, Ltd., 344 Camp Street, Suite 1100, New Orleans, Louisiana, the plaintiffs in the above entitled action will take the deposition of MR. MEAHER PATRICK TURNER whose address is Dept. of Housing & Urban Development, Deputy Director for Hous. & Mortgage Prod., 1001 Howard Ave., New Orleans, La. upon oral examination pursuant to the Federal Rules of Civil Procedure, before a Notary Public or some other officer authorized by law to administer oaths. The oral examination will continue from day to day until completed. You are invited to attend and take such part in the examination as shall be fit and proper.

DATED: December 17, 1976.

NELSON, NELSON &  
LOMBARD, LTD.A Professional Law Corpora-  
tion

/s/ PATRICIA SAIK  
 Patricia Saik  
 John P. Nelson, Jr.

(Certificate of Service Omitted)

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Dec. 17, 1976

#### NOTICE OF DEPOSITION

TO: (Names of Counsel Omitted)

PLEASE TAKE NOTICE that at 2:00 p.m. on the 27th day of December, 1976, at the law offices of Nelson, Nelson & Lombard, Ltd., 344 Camp Street, Suite 1100, New Orleans, Louisiana, the plaintiffs in the above entitled action will take the deposition of a corporate officer of GERTRUDE GARDNER, INC. whose address is 7934 Maple Street, New Orleans, Louisiana, upon oral examination pursuant to the Federal Rules of Civil Procedure, before a Notary Public or some other officer authorized by law to administer oaths. The oral examination will continue from day to day until completed. You are invited to at-

tend and take such part in the examination as shall be fit and proper.

DATED: December 17, 1976.

NELSON, NELSON &  
 LOMBARD, LTD.  
 A Professional Law Corpora-  
 tion

/s/ PATRICIA SAIK  
 Patricia Saik  
 John P. Nelson, Jr.

(Certificate of Service Omitted)

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Dec. 17, 1976

#### NOTICE OF DEPOSITION

TO: (Names of Counsel Omitted)

PLEASE TAKE NOTICE that at 2:00 p.m. on the 28th day of December, 1976, at the law offices of



Nelson, Nelson & Lombard, Ltd., 344 Camp Street, Suite 1100, New Orleans, Louisiana, the plaintiffs in the above entitled action will take the deposition of MR. JAMES MILLS whose address is Lawyers' Title Insurance Corporation, 822 Gravier Street, New Orleans, Louisiana upon oral examination pursuant to the Federal Rules of Civil Procedure, before a Notary Public or some other officer authorized by law to administer oaths. The oral examination will continue from day to day until completed. You are invited to attend and take such part in the examination as shall be fit and proper.

DATED: December 17, 1976.

NELSON, NELSON &  
LOMBARD, LTD.  
A Professional Law Corpora-  
tion

/s/ PATRICIA SAIK  
Patricia Saik  
John P. Nelson, Jr.

(Certificate of Service Omitted)

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Dec. 17, 1976

NOTICE OF DEPOSITION

TO: (Names of Counsel Omitted)

PLEASE TAKE NOTICE that at 3:00 p.m. on the 28th day of December, 1976, at the law offices of Nelson, Nelson & Lombard, Ltd., 344 Camp Street, Suite 1100, New Orleans, Louisiana, the plaintiffs in the above entitled action will take the deposition of MR. PAUL GRIENER whose address is Vets. Administration, Loan Guaranty Div., 701 Loyola Ave., New Orleans, Louisiana upon oral examination pursuant to the Federal Rules of Civil Procedure, before a Notary Public or some other officer authorized by law to administer oaths. The oral examination will continue from day to day until completed. You are invited to attend and take such part in the examination as shall be fit and proper.

DATED: December 17, 1976.

NELSON, NELSON &  
LOMBARD, LTD.  
A Professional Law Corpora-  
tion

/s/ PATRICIA SAIK  
 Patricia Saik  
 John P. Nelson, Jr.

(Certificate of Service Omitted)

IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Dec. 17, 1976

#### NOTICE OF DEPOSITION

TO: (Names of Counsel Omitted)

PLEASE TAKE NOTICE that at 11:00 a.m. on the 28th day of December, 1976, at the law offices of Nelson, Nelson & Lombard, Ltd., 344 Camp Street, Suite 1100, New Orleans, Louisiana, the plaintiffs in the above entitled action will take the deposition of MR. ANGEL V. MIRANDA whose address is Dept. of HUD, Area Economist, 1001 Howard Avenue, New Orleans, Louisiana upon oral examination pursuant to the Federal Rules of Civil Procedure, before a Notary Public or some other officer authorized by law to administer oaths. The oral examination will continue from day to day until completed. You are invited to at-

tend and take such part in the examination as shall be fit and proper.

DATED: December 17, 1976.

NELSON, NELSON &  
 LOMBARD, LTD.  
 A Professional Law Corpora-  
 tion

/s/ PATRICIA SAIK  
 Patricia Saik  
 John P. Nelson, Jr.

(Certificate of Service Omitted)

IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Dec. 21, 1976

#### NOTICE OF DEPOSITION

TO: (Names of Counsel Omitted)

Notice is given herewith that pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, the deposition of JULIAN HECKER (of CARRUTH MORTGAGE



CO.) will be taken on oral examination at the law offices of Nelson, Nelson & Lombard, Ltd., 344 Camp Street, Suite 1100, New Orleans, Louisiana, on December 30, 1976, at 11:00 a.m., and at any and all adjournments thereof.

The above named individual whose deposition is being taken is hereby notified to appear for this deposition and to bring with her:

1. Copies of all forms presently used for loan applications.
2. Any documents showing the names and addresses of all homesteads, real estate companies, brokers and realtors with whom your company is doing business or since October 31, 1971, have done business with in the past.
3. Any documents containing the names and addresses and amounts of residential real estate loans placed or applied for or sold to the following for each year from 1971 through 1975:
  - a. Finance companies;
  - b. Homesteads;
  - c. Mutual savings banks;
  - d. Insurance companies;
  - e. Other mortgage companies or brokers;
  - f. Government or quasi-governmental agencies (including for example, FHA (Federal Housing Authority), VA (Veterans Administration), FNMA (Federal National

Mortgage Association) and GNMA (Government National Mortgage Association)).

4. Financial statements or other documents showing the volume of:
  - a. Residential real estate loans carried by Carruth.
  - b. Residential real estate loans placed with others.
  - c. Residential real estate loans sold to other (including governmental agencies).
  - d. Residential real estate loans carried with title insurance.
5. Documents supporting the number, volume and percentage of total loans placed or carried with out-of-state lenders or borrowers and out-of-state sellers or purchasers of residential real property.

DATED: December 21, 1976.

NELSON, NELSON &  
LOMBARD, LTD.  
A Professional Law Corporation

/s/ PATRICIA SAIK  
Patricia Saik  
John P. Nelson, Jr.

(Certificate of Service Omitted)

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Dec. 21, 1976

NOTICE OF DEPOSITION

TO: (Names of Counsel Omitted)

Notice is given herewith that pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, the deposition of EDMOND G. MIRANNE of Security Homestead Association will be taken on oral examination at the law offices of Nelson, Nelson & Lombard, Ltd., 344 Camp Street, Suite 1100, New Orleans, Louisiana, on Thursday, January 6, 1977 at 9:30 a.m., and at any and all adjournments thereof.

The above named individual whose deposition is being taken is hereby notified to appear for this deposition and to bring with him:

1. Copies of all forms used for loan applications.
2. All documents supporting loans guaranteed or placed with FHA and/or VA assistance, assurance, or guarantee.
3. Documents showing total volume of VA/FHA premiums paid for or on behalf of loans carried

on books of Security Homestead from October 31, 1971 to 10/31/75, by year.

4. Settlement sheets for loan closings.
5. Volume, total number and percentage of loans with title insurance.
6. Volume, total number and percentage of loans with mortgage insurance; name and addresses of insurance companies.
7. Any FNMA forms used or adapted or modified by Security Homestead.
8. Documents showing name, address of all real estate brokers, realtors, mortgage brokers, to whom a commission was paid.
9. Documents supporting volume, number of transactions, percentage of loans sold to a third party — FNMA, GNMA, insurance companies, etc.
10. Any documents such as composite computer printouts which relate to number of loans, dollar volume, and breakdown by loan type.

DATED: December 21, 1976.

NELSON, NELSON &  
LOMBARD, LTD.  
A Professional Law Corporation



/s/ PATRICIA SAIK  
 Patricia Saik  
 John P. Nelson, Jr.

(Certificate of Service Omitted)

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Dec. 21, 1976

NOTICE OF DEPOSITION

TO: (Names of Counsel Omitted)

Notice is hereby given that pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, the deposition of STAN WEBER of Stan Weber and Associates, Inc., Realtors, will be taken on oral examination at the law offices of Nelson, Nelson & Lombard, Ltd., 344 Camp Street, Suite 1100, New Orleans, Louisiana, on the 29th day of December, 1976, at 3:30 p.m., and at any and all adjournments thereof.

The above named individual whose deposition is being taken is hereby notified to appear for this deposition and to bring with him:

1. Copies of agreements with affiliates, for relocation services, listing services for residential properties, fee splitting with out of state real estate brokers, agents, realtors, or other entities, including as "affiliates", 21st Century, Inc., Gallery of Homes, etc.
2. Documents supporting volume of transactions generated through relocation and/or affiliate services.
3. Documents describing the services provided by Stan Weber to the public.
4. Samples of documents listing the location, price, time period and other details of affiliated listings, and/or relocations, whether listed by your company or by another real estate entity.
5. Listing agreements or types of listing agreements pertaining to affiliate services.
6. Documents, and source, including computer printouts for total number of transactions, the gross dollar volume of transactions, the type and size of transactions relating to all activities of your company.
7. Any and all forms used by Stan Weber pertaining to buying, selling, financing and insuring residential real estate transactions.
8. Copies of ad formats, advertising contracts, whether in newspapers, trade journals, magazines, or like publications; and documents

supporting the cost of advertising, both interstate and intrastate, including financial statements for the years 1971, 1972, 1973, 1974 and 1975.

9. Copies of monthly telephone statements for 1975.
10. Documents showing name, address, gross dollar volume and number of transactions conducted with, by, or through any homestead, mutual savings bank, commercial bank, mortgage company, insurance company, and/or quasi or quasi-governmental agency.

DATED: December 21, 1976.

NELSON, NELSON &  
LOMBARD, LTD.  
A Professional Law Corpora-  
tion

/s/ PATRICIA SAIK  
Patricia Saik  
John P. Nelson, Jr.

(Certificate of Service Omitted)

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Dec. 21, 1976

MOTION FOR TIME TO EXTEND DISCOVERY

NOW INTO COURT come plaintiffs, through undersigned counsel, and respectfully show the court as follows:

1. The cut-off date for discovery of information pertaining to subject matter jurisdiction is December 31, 1976.
2. Several depositions have been scheduled before December 31, 1976. However, plaintiffs have encountered difficulty in scheduling depositions for three or four additional persons before December 31, 1976. These depositions can be scheduled in early January, 1977.
3. Plaintiffs request an additional two weeks, that is, through January 13, 1977, in order to complete discovery.
4. Plaintiffs have been authorized to state that defendants do not oppose an extension of time through January 13, 1977.



Respectfully submitted,  
NELSON, NELSON &  
LOMBARD, LTD.  
A Professional Law  
Corporation

/s/ PATRICIA SAIK  
Patricia Saik  
John P. Nelson, Jr.

DATE OF ENTRY: Dec. 23, 1976.

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ORDER

Considering the foregoing,

IT IS ORDERED that the cutoff date for discovery of matters pertaining to subject matter jurisdiction is hereby extended from December 31, 1976, to January 14, 1977.

Signed at New Orleans, Louisiana, this 22d day of December, 1976.

/s/ EDW. J. BOYLE, SR.  
UNITED STATES DISTRICT  
JUDGE

(Certificate of Service Omitted)

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Dec. 22, 1976

PLAINTIFFS' FIRST SET OF  
INTERROGATORIES TO DEFENDANTS

TO: (Names of Counsel Omitted)

The plaintiffs request that each defendant, by an officer or agent thereof, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories. Please take notice that a copy of such answers must be served upon the undersigned within thirty (30) days after the service of these interrogatories.

Definitions

1. "Damage period" refers to the period from October 31, 1971 through October 31, 1975.
2. "Residential real property" or "homes" refers to single residence, duplex, triplex and fourplex.
3. "Identify" means that wherever in these interrogatories you are asked to "identify" a document, please designate:

- (a) Type of document, such as letter, memorandum, report, diary, expense account, etc.
- (b) Information sufficient to enable plaintiffs to recognize the document such as its date, names and addresses of originators, title of the document, number of pages, etc. Form documents may be identified by the title of a form.
- (c) The present or last known location of the document with the name and address of the possessor.

#### Interrogatories

1. State the total number of completed sales for residential real property by defendant for each of the following years:
  - (a) 1971
  - (b) 1972
  - (c) 1973
  - (d) 1974
  - (e) 1975
2. State the gross dollar amount of completed sales transactions by defendant for residential real property for each of the following years:
  - (a) 1971
  - (b) 1972
  - (c) 1973

- (d) 1974
  - (e) 1975
3. State for each of the following years, the number of completed real estate transactions in which you have participated as a real estate broker wherein the buyer financed the purchase with the Federal Housing Administration (FHA), Veterans Administration (VA) or other United States Government guaranteed financing:
    - (a) 1971
    - (b) 1972
    - (c) 1973
    - (d) 1974
    - (e) 1975
  4. What documents or other information did you refer to in answering the immediately preceding interrogatory.
  5. State, for each of the following years, the number of completed real estate transactions in which you have participated as a broker wherein the buyer or seller was a resident of a state other than Louisiana: (a) 1971; (b) 1972; (c) 1973; (d) 1974; (e) 1975.
  6. At any time during the damage period, state whether defendant has ever advertised in any magazine, newspaper, trade journal, television



station, radio station or other media where such advertisement is circulated to or received by people located outside the state of Louisiana.

7. If the answer to the immediately preceding interrogatory is in the affirmative, for each advertisement state:
  - (a) The name and address of the media utilized
  - (b) The date the advertisement was placed
  - (c) The exact text of the advertisement.
8. If at any time since January 1, 1971, defendant operated, participated in or subscribed to a multiple listing service, national or international relocation service, inter-city relocation service, or property location or sale service of any nature, identify:
  - (a) The multiple listing service, national or international relocation service, inter-city relocation service, photo listing service or other such service.
  - (b) The service you provide and the service which is provided to you.
  - (c) The geographical area the service or services encompass.
  - (d) Any and all conditions which must be satisfied in order to be able to use the service or services.
  - (e) Any arrangement as to the brokerage fees

or commissions charged for the sale of residential real property listed through the service.

- (f) Any arrangement as to division of the brokerage fees or commissions charged for the sale of real property listed through the service.
  - (g) The exact time period you operated the service, participated in it, or subscribed to it.
  - (h) The states or countries where your listings are offered for sale through the service; and
  - (i) The states or countries wherein you can offer listings to potential buyers through the service.
9. Identify all documents you distributed, received or have access to in connection with any multiple listing service, national or international relocation service, inter-city relocation service, photo listing service, or other such service, including but not limited to advertising materials for the service and listing catalogs.
10. State the office address (including the city and state) of each and every office of defendant wherever located.

11. Describe the entire organizational structure of each defendant, indicating by way of example, whether defendant is an affiliate or subsidiary of any other corporation, partnership or sole proprietorship and a description of the business and type of activities of each parent, affiliate or subsidiary.
12. State whether defendant will make available to plaintiffs without a motion to produce copies of all telephone bills showing all long distance calls (both intra and interstate) for every month from October 1971 to October 1975. If the answer is in the affirmative, please attach this information to your answers.
13. State whether defendant will make available to plaintiffs without a motion to produce, any and all identification books, directory, or other system containing the names and addresses of persons or companies with which a defendant realty company does business or from which it might solicit whether directly or through speculation. If the answer to this interrogatory is in the affirmative, please attach these documents to your answers.
14. State whether defendant will provide without a motion to produce copies of any brochures or other solicitations containing information about services which defendant provides and a list of the individuals and businesses to whom

such brochures were mailed during the damage period. If the answer to this interrogatory is in the affirmative, please attach these documents to your answers.

15. Give a complete description of the scope and operation of any placement or location or relocation services which defendant may provide.
16. State the names and addresses of all title insurance companies which defendant has contacted during the damage period in conjunction with any real estate-related transaction or with whom closings have been effected or who may have provided title insurance in conjunction with such closings.
17. State the names and addresses of all lending institutions, public or private:
  - (a) To which defendant has referred customers during the damage period.
  - (b) Which defendant may have contacted to attempt to secure financing for its clients during the damage period.
  - (c) Which have participated directly or indirectly during the damage period with any sale or purchase of residential real property in which defendant received a commission or brokerage fee.



The term "lending institutions" includes but are not limited to homesteads, mutual savings banks, commercial banks, insurance companies, credit unions, private individuals, Federal Housing Authority, mortgage bankers, Veterans Administration, Federal National Mortgage Association, General National Mortgage Association and the U.S. Department of Housing & Urban Development.

18. State whether defendant will provide without a motion to produce copies of any correspondence between the defendant and
- (a) The Veterans Administration
  - (b) The U.S. Dept. of Housing & Urban Development
  - (c) Any out-of-state lending institutions.

If the answer to subpart (a) (b) or (c) is in the affirmative, please attach copies of this correspondence to your answers.

19. For the period from October 31, 1971 through October 31, 1975, for each sale of residential real property where a commission was earned, please state:
- (a) The seller's name and address
  - (b) The buyer's name and address
  - (c) The closing date
  - (d) Total amount paid for the property

- (e) Gross commission paid in dollars and as a percent of the sales price
  - (f) The identity of the listing and selling broker, if different
  - (g) The commission split, if any
  - (h) The fee paid to the Real Estate Board of New Orleans, the Jefferson Board of Realtors and any other real estate board
  - (i) The amount of financing for each transaction
  - (j) The name and address of the lender
  - (k) Whether title insurance was obtained and, if so, the name and address of any surety or indeminitor of the sanctity or merchantability of title.
20. Identify the documents referred to in answering the immediately preceding interrogatory.

Respectfully submitted,  
NELSON, NELSON &  
LOMBARD, LTD.  
A Professional Law  
Corporation

/s/ PATRICIA SAIK  
Patricia Saik  
John P. Nelson, Jr.

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344 Camp Street, Suite 1100  
New Orleans, Louisiana  
70130  
Phone: 523-5893

(Certificate of Service Omitted)

(Mailed December 22, 1976)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Dec. 23, 1976

NOTICE OF DEPOSITION

TO: (Names of Counsel Omitted)

PLEASE TAKE NOTICE that at 2:00 p.m. on the 6th day of January, 1977, at the law offices of Nelson, Nelson & Lombard, Ltd., 344 Camp Street, Suite 1100, New Orleans, Louisiana, the plaintiffs in the above entitled action will take the deposition of MAX DERBES, JR. whose address is Real Estate Bd. of New Orleans, Inc., 826 Perdido, Nola, upon oral examination pursuant to the Federal Rules of Civil Procedure, before a Notary Public or some other officer authorized by law to administer oaths. The oral examination will con-

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tinue from day to day until completed. You are invited to attend and take such part in the examination as shall be fit and proper.

DATED: December 23, 1976.

NELSON, NELSON &  
LOMBARD, LTD.  
A Professional Law  
Corporation

/s/ PATRICIA SAIK  
Patricia Saik  
John P. Nelson, Jr.

(Certificate of Service Omitted)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Dec. 28, 1976

AMENDED NOTICE OF DEPOSITIONS

TO: (Names of Counsel Omitted)

PLEASE TAKE NOTICE that the depositions of the following persons previously scheduled by plaintiffs



for the following dates and times are hereby rescheduled. The depositions to be rescheduled are:

1. Mr. Patrick Turner, Department of Housing and Urban Development, originally noticed for Tuesday, December 28, 1976, at 9:00 a.m.
2. Angel Miranda, Department of Housing and Urban Development, originally noticed for Tuesday, December 28, 1976, at 11:00 a.m.
3. Mr. James Mills, Lawyers' Title Insurance Corporation, originally noticed for Tuesday, December 28, 1976, at 2:00 p.m.
4. Mr. Paul Griener, Veterans Administration, originally noticed for Tuesday, December 28, 1976, at 3:00 p.m.
5. Mr. Alfred T. Post, Executive Vice President, Gertrude Gardner, Inc., originally noticed for Wednesday, December 29, 1976, at 2:00 p.m.
6. Mr. Stan Weber, Stan Weber & Assoc., originally noticed for Wednesday, December 29, 1976, at 3:30 p.m.
7. Mr. Julian Hecker, Carruth Mortgage Company, originally noticed for Thursday, December 30, 1976, at 11:00 a.m.
8. Mr. Max Derbes, Real Estate Board of New Orleans, originally noticed for Thursday, January 6, 1977, at 2:00 p.m.

PLEASE TAKE NOTICE that pursuant to Rule 30(b), Federal Rules of Civil Procedure, plaintiffs will take the depositions upon oral examination of the following persons listed below at the respective dates and times indicated at the law offices of Nelson, Nelson and Lombard, Ltd., 344 Camp Street, Suite 1100, New Orleans, Louisiana 70130, before a Notary Public or some other officer authorized by law to administer oaths. The oral examination shall continue from day to day until completed. You are invited to attend and take such part in the examination as shall be fit and proper.

1. Mr. Patrick Turner, Department of Housing & Urban Development, 1001 Howard Avenue, New Orleans, Louisiana, on Monday, January 3, 1977, at 9:30 a.m.
2. Mr. Angel Miranda, Department of Housing & Urban Development, 1001 Howard Avenue, New Orleans, Louisiana, on Monday, January 3, 1977, at 11:00 a.m.

The above named individuals, viz, Mr. Patrick Turner and Mr. Angel Miranda whose depositions are to be taken are hereby notified to appear for the depositions and bring with them:

- (a) Documents or records showing the volume of HUD loan guarantees for the Parishes of Jefferson and Orleans, the number of homes so insured, and any other breakdowns, compilations or other records

regarding HUD's insurance of residential real property in Orleans and Jefferson Parishes for the period from 1970 to the present.

- (b) Any documents describing the services and programs of the Department of Housing & Urban Development in connection with residential real property.
- 3. Mr. James Mills, Lawyers' Title Insurance Company, 822 Gravier Street, New Orleans, Louisiana, on Thursday, January 6, 1977, at 2:00 p.m.
- 4. Mr. Paul Griener, Veterans Administration, Loan Guaranty Division, 701 Loyola Avenue, New Orleans, Louisiana, on Tuesday, January 4, 1977, at 10:00 p.m.

The above named individual, *viz*, Mr. Paul Griener, whose deposition is to be taken is hereby notified to appear for this deposition and bring with him:

- (a) Documents or records showing the volume of VA loan guarantees for the Parishes of Jefferson and Orleans, the number of homes so insured, and any other breakdowns or compilations or other records regarding the VA's insurance of residential real property in Orleans and Jefferson Parishes for the period from 1946 to the present.

- (b) Any documents describing the services and programs of the Veterans Administration and the Department of Housing & Urban Development.

- 5. Mr. Alfred T. Post, Executive Vice President, Gertrude Gardner, Inc., 7934 Maple Street, New Orleans, Louisiana, on Monday, January 10, 1977, at 2:00 p.m.
- 6. Mr. Stan Weber, Stan Weber & Assoc., 3841 Veterans Boulevard, Metairie, La., on Monday, January 10, 1977, at 10:30 a.m.

The above named individuals, *viz*, Mr. Alfred T. Post and Mr. Stan Weber, whose depositions are to be taken, are hereby notified to appear for their depositions and bring with them:

- (a) Copies of agreements with affiliates, for relocation services, listing services for residential properties, fee splitting with out-of-state real estate brokers, agents, realtors, or other entities, including as "affiliates", 21st Century, Inc., Gallery of Homes, etc.
- (b) Documents supporting volume of transactions generated through relocation and/or affiliate services for 1971, 1972, 1973, 1974 and 1975.
- (c) Documents describing the services provided by your company to the public.



- (d) Samples of documents listing the location, price, time period and other details of affiliated listings, and/or relocations, whether listed by your company or by another real estate entity.
- (e) Listing agreements or types of listing agreements pertaining to affiliate services.
- (f) Documents, and source, including computer printouts, for total number of transactions, the gross dollar volume of transactions, the type and size of transactions relating to all activities of your company.
- (g) Any and all forms used by your company pertaining to buying, selling, financing and insuring residential real estate transactions.
- (h) Copies of ad formats, advertising contracts, whether in newspapers, trade journals, magazines, or like publications; documents supporting the cost of advertising, both interstate and intrastate, including financial statements for the years 1971, 1972, 1973, 1974, and 1975.
- (i) Copies of monthly telephone statements for 1975.
- (j) Documents showing name, address, gross dollar volume and number of transactions conducted with, by, or through any homestead, mutual savings bank, commercial bank, mortgage company, insurance

company, quasi or quasi-governmental agency.

- 7. Mr. Julian Hecker, Carruth Mortgage Company, 3601 I-10 Service Road, Metairie, Louisiana, on Friday, January 7, 1977, at 10:00 a.m.

The above named individual, viz, Mr. Julian Hecker, whose deposition is to be taken, is hereby notified to appear for his deposition and bring with him:

- (a) Copies of all forms presently used for loan applications.
- (b) Any documents showing the names and addresses of all homesteads, real estate companies, brokers and realtors with whom Carruth Mortgage is doing business or, since October 31, 1971, has done business with in the past.
- (c) Any documents containing the names and addresses and amounts of residential real estate loans placed or applied for or sold to the following each year from 1971 through 1975:
  - (1) Finance companies;
  - (2) Homesteads;
  - (3) Mutual savings banks;
  - (4) Insurance companies;
  - (5) Other mortgage companies or brokers;

- (6) Governmental or quasi-governmental agencies (including, for example, FHA (Federal Housing Authority), VA (Veterans Administration), FNMA (Federal National Mortgage Assn.) and GNMA (Government National Mortgage Assn.)).
  - (d) Financial statements or other documents showing the volume of:
    - (1) Residential real estate loans carried by Carruth.
    - (2) Residential real estate loans placed with others.
    - (3) Residential real estate loans sold to others.
    - (4) Residential real estate loans carried with title insurance.
  - (e) Documents supporting the number, volume and percentage of total loans placed or carried with out-of-state lenders or borrowers and out-of-state sellers or purchasers of residential real property.
8. Mr. Max Derbes, First Vice President, Real Estate Board of New Orleans, Inc., 826 Perdido Street, New Orleans, Louisiana, on January 13, 1977, at 2:00 p.m.

DATED: December 28, 1976.

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A Professional Law  
Corporation

/s/ PATRICIA SAIK  
Patricia Saik  
John P. Nelson, Jr.

(Certificate of Service Omitted)  
(Mailed December 28, 1976)

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Jan. 11, 1977

#### OBJECTIONS TO INTERROGATORIES

Defendants, Gertrude Gardner, Inc., Latter & Blum, Inc., Waguespack Pratt, Inc., Stan Weber & Associates, Inc., Sandra, Inc. Realty, Isabelle McLeod, Realtors, Real Estate Board of New Orleans, Inc. and Jefferson Board of Realtors, Inc., object to "Plaintiffs' First Set of



Interrogatories to Defendants" served on each of them on 23 December 1976.

The grounds of this objection are that, pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendants have 30 days from service of these interrogatories, or until 22 January 1977, to file answers or objections thereto and, since the cutoff date for discovery of matters pertaining to subject matter jurisdiction is 14 January 1977, insofar as they seek information pertaining to jurisdiction these interrogatories are not timely.

Insofar as these interrogatories seek information pertaining to any aspect of this cause other than subject matter jurisdiction, further grounds of objection are that they are and will continue to be premature until disposition of defendants' motion to dismiss for want of subject matter jurisdiction.

Respectfully submitted,

Harry S. Redmon, Jr.  
and  
Rutledge C. Clement, Jr.  
Attorneys for Gertrude  
Gardner, Inc.

Moise W. Dennerly  
and  
Edward J. McCloskey  
Attorneys for Latter &  
Blum, Inc.

Edward F. Wegmann  
and  
Fred P. Westenberger  
Attorneys for Waguespack  
Pratt, Inc.

Charles F. Barbera  
Attorney for Stan Weber &  
Associates, Inc.

Ms. Cynthia Samuel  
Attorney for Sandra, Inc.  
Realty

Harry McCall, Jr., Leon Sarpy  
and Gerald Wasserman  
Attorneys for Isabelle  
McLeod, Realtors

Arthur L. Ballin  
and  
Frank C. Dudenhefer  
Attorneys for Real Estate  
Board of New Orleans, Inc.

Roy L. Price  
Attorney for Jefferson  
Board of Realtors, Inc.

/s/ HARRY McCALL, JR.  
Harry McCall, Jr.

(Certificate of Service Omitted)

Minute Entry  
January 14, 1977  
BOYLE, J.

(Number and Title Omitted)

Filed: Jan. 18, 1977

A further conference was held this day.

Present: John P. Nelson, Jr., Esq.  
Ms. Patricia Saik  
For Plaintiffs  
Arthur L. Ballin, Esq.  
For Real Estate Board of New Orleans,  
Inc.  
Harry S. Redmon, Jr., Esq.  
For Gertrude Gardner, Inc.  
Edward F. Wegmann, Esq.  
For Waguespack, Pratt, Inc.  
Ms. Cynthia Samuel  
For Sandra, Inc.  
Harry McCall, Jr., Esq.  
For Isabelle C. McLeod  
Moise W. Dennerly, Esq.  
J. W. Vaudry, Jr., Esq.  
For Latter & Blum, Inc.  
Roy L. Price, Esq.  
For Jefferson Board of Realtors, Inc.

Not Present:

Charles F. Barbera, Esq.  
For Stan Weber and Associates, Inc.

Counsel for plaintiffs indicated they may desire additional discovery and counsel for defendants, taking the position that the delay for completion of discovery fixed and as extended by the orders of Court had expired, declared they would object thereto and had already objected to answering interrogatories propounded by plaintiffs.

At the request of plaintiffs' counsel, and without objection by the defendants, the Court allowed plaintiffs until February 18, 1977 to submit an additional memorandum in opposition to defendants' motion to dismiss. Counsel for defendants requested and were granted until March 11, 1977 to reply to plaintiffs' memorandum.

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January 28, 1977

Judge Edward Boyie  
United States District Judge  
500 Camp Street  
New Orleans, Louisiana 70130

Att'n: Mr. Jerry Meunier



Dear Mr. Meunier:

Concerning our telephone conversation of today, the Motion to Quash on behalf of Carruth Mortgage Corporation, is now moot. We have satisfied the parties with the information we were able to furnish.

Sincerely,

/s/ MOISE S. STEEG, JR.  
MOISE S. STEEG, JR.

MSSjr/bg

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[419] IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Jan. 20, 1977

Deposition of EDMOND G. MIRANNE, taken in the office of Messrs. Miranne & Miranne, Suite 401, 219 Carondelet Street, New Orleans, Louisiana, on Thursday, January 6, 1977.

APPEARANCES: (Omitted)

\* \* \* \*

EXAMINATION BY MR. NELSON:

[4] Q Mr. Miranne, what is your present job?

A Well, I am President of Security Homestead Association.

Q And what type of business is Security Homestead?

A Savings and loan.

Q How many branch offices does Security have at the present time?

A Seven.

Q And what parishes are they located in?

A St. Bernard, Orleans, Jefferson.

Q Would you briefly tell us, are you of the opinion that Security is the largest homestead in the state, I mean volume of business?

A We are in New Orleans, and we were in the state until the merger took place in Lake Charles.

Q Mr. Miranne, in connection with this testimony, I am going to ask you some questions concerning residential homes, one, two, three or four family units, and, if possible, the answers could relate to that, to those units.

[5] Between 1971, let's say, and the end of 1976, approximately how many mortgages, the number of mortgages, did Security make for residential homes?

A For 1976, we made fifteen hundred and fifty-six, let's say over fifty-five hundred.

Q So, it would be fifty-five hundred between January of '71 —

A Well, approximately, he didn't give me a breakdown.

Q You have some notes in front of you, and those notes have referred to statistics of 1976?

A Right.

Q In 1976, of the total mortgages on residential homes, by Security Homestead, how many were FHA and federally program insured?

A Well, you had FHA, seventy-three thousand six hundred and fifty and a total of five, and VA, one, \$47,-500.00. Now, the amounts of Freddie Mac —

Q Before we get into that, of the fifteen hundred and fifty-six mortgages, how many were federal insured?

[6] A I haven't gotten the figures.

Q Do you have any statistics?

A I have statistics for 1976 here. You asked for the five years. I told them to give it to me, and I didn't get it yet.

MR. VAUDRY:

What was the figure for FHA?

THE WITNESS:

Seventy-three thousand six hundred fifty.

To give you a breakdown, in the year 1972, we closed seven hundred and twenty-four loans, twenty-two million eight hundred fifteen thousand nine hundred forty-eight, and in 1973, nine hundred forty-six loans, thirty-one million seven hundred twenty-four thousand two hundred twenty, in 1974, we closed seven hundred and ninety-eight loans for thirty million sixty-seven thousand four hundred, and in 1975, we closed a

thousand forty loans for forty-two million eight hundred fourteen thousand one hundred seventy-three, and for 1976, we closed fifteen hundred [7] fifty-six loans for a total of sixty-two million one hundred twenty-four thousand five hundred fifty-four and forty-four cents.

EXAMINATION BY MR. NELSON:

Q The number of FHA insured loans, this information is being secured for you?

A I will get it for you for the five years. The five, the seventy-three thousand six hundred fifty are FHA, and VA loans, only one, and that would be none in the last five years, except this one. We have been out of that business since about '48.

Q You have not insured any VA insured loans?

A Except this one last week that we closed.

Q Well, we are going to go on, and then, we will pick up the number of FHA loans.

A We were not in the FHA/VA market in the last five years.

(Off the record)

MR. WEGMANN:

When he speaks as to the amount of loans he made, FHA loans he made and VA loans he made, we want it on the [8] record, regardless of the facts and figures or conjectures or speculations, we want it on the record.



## EXAMINATION BY MR. NELSON:

Q At this particular moment, you have instructed one of your employees to secure for you some statistics.

While we are waiting for those statistics, would you express an opinion as to how many FHA/VA loans were made by Security — insured either FHA or VA in the last five years?

A There is no sense in my saying that until I get the figures.

## MR. WEGMANN:

Did you not say a few minutes ago, Mr. Miranne, that you have been out of the FHA/VA loan business since 1948, with the exception of this very nominal number of loans?

## THE WITNESS:

In the last five years, we have been out of the FHA/VA market.

## EXAMINATION BY MR. NELSON:

Q Mr. Miranne, during the last five years, were [9] there any type of federally insured programs at all in which Security was involved?

A No.

Q So, the sources of the monies that were borrowed were considered what you call conventional financing?

A Right.

Q Now, in connection with the funds available for mortgage loans, insured or otherwise, would you please describe what, if any funds, come in from out of the state, and during the course of a year, could you describe that?

A Well, yes, a portfolio for money comes from all the banks and federal owned banks out of Little Rock.

Q What happens to the notes that various borrowers sign with Security, let's say in the last five years, what does Security do with the notes on the types of mortgages we are talking about, on residential property?

A We close them and maintain all of the notes in the vaults, this being a bank building.

[10] Q Are any of the notes ever put up for security for any money that comes out of the state?

A Only if we sell the paper. We do sell paper for the Freddie Mac.

Q What is Freddie Mac?

A A federal home loan mortgage corporation that buys paper from us.

Q That started when?

A In the last year, the Federal Home Loan Mortgage Corporation out of Little Rock, for the purpose of purchasing papers or notes for savings and loans in order to make you fund money for more loans.

Q Actually, with Freddie Mac transactions, how is it done?

A We close the loan like we do, and we bundle up the notes and all of the papers and anything else and

put them together, and we send them up to Freddie Mac, and Freddie Mac goes over them, and if they comply with the regulations, in so far as they bind their paper, they send up a check.

[11] Q How often is this done?

A I dare say, we have only done it within the last year, only four times. We sold off four million forty-five thousand three hundred and fifty-six dollars in secondary market notes that we sold off.

Q In what year?

A Last year.

Q 1976?

A Part of '76 and '75.

Q Does Security deal with any outside of state financing institutions outside of the state of Louisiana or only Little Rock?

A The only one, other than Little Rock, we are trying to culminate a deal to sell paper in Baltimore. We have to put all the details together right now. This is a savings and loan in Baltimore, Maryland.

Q Prior to January 1976, between '71 and '75, the end of '75, was Security borrowing money from any institutions outside of the state of Louisiana?

A No, other than the Federal Home Loan Bank, which is our mother bank.

[12] Q Do you have available the amount of money that was borrowed from that home loan bank for 1972, '73, '74 and '75?

A I will have to get it.

Q You say in '76, it was only approximately four million that came in from —

A The amount of loans sent to the secondary market was four million —

Q So, the rest of the money that went through the company in 1976, I assume, came from local banks?

A Yes, and the Federal Home Loan Bank.

Q Located where?

A Little Rock, Arkansas.

Q How much money from the Federal Home Loan Bank from 1972 through 1976?

A I will have to get you the figures. It varies. As you know, we borrow, pay them off and borrow again. At the end of a year, we could give you a statement from the end of the year. We are in, and we are out. We borrow and we pay them off.

Q Would it be possible for you to give me a percentage of the number of notes [13] represented by the number of mortgages, the number of mortgages that you testified to, how many of these notes are used to secure money received from the banks outside of the state of Louisiana?

A Only one bank, the Federal Home Loan Bank, no others.

Q Is this information available?

A Well, I'm going to try to get what I borrowed, the money. We are getting beyond the scope with all these questions, but go ahead, but I have it marked down here.

Q Have you ever done business with Fannie Mae?

A Sure.

Q On residential homes?

A Yes, residential.



Q When?

A I would have to get you the answer there. In the last five years, it is only been this year that we have done business with Fannie Mae. I will have to check that out.

Q When you do business with Fannie Mae, what is the procedure that you go through, [14] what happens?

A It will be the same procedure as when you do business with the Federal Home Loan Bank. In other words, you sell your notes, and well, you bundle up your notes and meet the requirements of Fannie Mae and send them a package up. We are just getting into Fannie Mae. I don't know if I can find that answer out.

Q What about Gennie Mae?

A G.M.A. — I don't think we are in that at all.

Q What about insurance companies in the last five years?

A None at all.

Q Any other type of mortgage brokers?

A No.

Q No other companies?

A No.

Q Now, other than the Federal Home Loan Bank, you say there is no other transfer of funds that comes to this company from outside of the state?

A No, unless it be investments by other savings [15] and loans, sometimes, but usually, that is within the state savings and loans invested with you, certificates of deposit and things like that, you know.

Q Are there any investments in any companies at all with your company from companies that are domiciled outside of the state of Louisiana?

A I wouldn't know that answer. We have thirty-six thousand five hundred accounts. I imagine there are many companies that have investments with us throughout, outside of the state. Whether they are lending institutions, I don't know. We keep no tally that way. We just throw them in as number of accounts. It is just a plain savings account. They deposit so many dollars with us, and we pay them a dividend.

Q If you were to find out how many companies outside of the state of Louisiana have investments in your business — you could find that out?

A I guess, if you gave me about sixty days I [16] might be able to.

Q What records would you go to?

A I would have to go through everyone of the thirty-six thousand accounts in order to find that out.

Q Do these various companies receive any type of communication at all during the course of a year from your company?

A Yes, they would be stockholders in the company. It is owned by the people.

Q You would have a list of addresses?

A Yes, for savings accounts.

Q If we would go through a list of addresses, we would get some idea of how many outside accounts Security has?

A If we went through every one, yes.

Q Mr. Miranne, do you have anyone in your company specifically assigned to take care of federal programs?

A Only the Freddie Mac program; secondary market.

Q Is this employee, is this employee specifically assigned that job?

A He is assigned to that and everything. That is one of his assignments.

[17] Q How many people do you have working on that?

A Actually, in our operation, everybody works on everything, including myself. In other words, no matter what program it may be, but he is in charge of that with Mr. Faia. Mr. Faia would be our man, but he handles all commercial loans, as far as this department goes. He has other duties. It is not just a specific job.

(Off the record)

#### THE WITNESS:

Let me see — in the FHA loans, all in the last —

#### EXAMINATION BY MR. NELSON:

Q Wait a minute, Mr. Miranne. You have now in your possession some statistics, correct, in connection with how many loans are secured from federally funded programs?

A Well, I have the total statistics here. What I am trying to say is that you interrupted me, and what I am saying now, in the last five years, we have made no FHA loans in the last five years. [18] We have made one VA loan. We have been in the Freddie Mac for approximately two and one-half years. We started into the FHA loans at the beginning of this year. We have five, and like I said, one VA.

Q You said you started in FHA loans beginning in this year, '77?

A '76. In other words, we were out of it up until that time, and about the beginning of this year, we started and did some FHA loans.

Q What date are you talking about?

A January 1976.

Q How many FHA approved loans did you make during the year?

A Five.

Q What about Freddie Mac, how many loans?

A A hundred and fifteen.

Q Actually, how does the Freddie Mac procedure work?

A All we do is make a loan, and after we make the loan, we follow the guidelines and put the package together, everything they want in there, and we file it and [19] send it to them, and they go over the appraisal and go over the surveys and descriptions and notes, and if everything meets what they require, they buy the paper from us.

Q Do you have in your statistics the money volume of the business with Freddie Mac?

A Yes, it is four million forty-five thousand three hundred fifty-six dollars and seventy-four cents.

Q Would your statistics, do you have any reference there to the Federal Home Loan Bank?

A Well, yes, that is a subsidiary of the Home Loan Bank. In other words, the Freddie Mac, the secondary market is a subsidiary of the Federal Home Loan Bank. It is run by them. It is one of their subsidiaries that was put together to buy paper.



Q Other than the four million, we are talking about no other money that came to this company outside of the state of Louisiana in 1976?

[20] A Other than the Federal Home Loan Bank.

Q How much money was borrowed through them?

A I am going to have that figure.

Q In 1972, '73, and '74 and '75, and we can assume that this company did not have any mortgages insured by FHA, is that correct?

A Only five.

Q And those five were in '76?

A '76, end of '75.

Q And the total number of loans that were in, in which the Federal Home Loan Bank is concerned, that information is on its way, is that correct?

A Right. In other words, what I am going to give you is how much money did we borrow at the end of '72, '73, '74 and '75. It overlaps. It goes up and down all during the year. So, consequently, I will give you the figures at the end of '72, '73, '74 and '75, what we borrowed at the end of the year.

Q As far as out of the state investors are concerned, do you have an opinion as to [21] the percentage, number wise volume, the amount?

A No opinion, no sir.

Q Do your records, do you have written records for any type of recorded memoranda that would show how many customers come to you for residential loans without the services of a real estate broker or a realtor?

MR. WEGMANN:

Object to the form of the question.

MR. NELSON:

You can answer it.

THE WITNESS:

So I understand the question, you are asking me how many actual loans come to me?

EXAMINATION BY MR. NELSON:

Q No, sir. My question is, do you keep any written records or any recorded memoranda showing the number of customers that come to Security seeking loans who do not have the service of a real estate broker or realtor?

A No, we do not, and the reason being, when [22] they bring a loan to us, unless it was a friend that recommended us or something like that, that they have called us, we have no need to keep that, because we do not underwrite our loans on what the real estate agent does. It is of no importance to us what the real estate agent thinks.

Q How long have you been connected with Security Homestead?

A Since I was twelve years old, and I am fifty-six.

Q When did you graduate from law school?

A '48.

Q Following that, you began working for Security as a closing attorney?

A I started licking envelopes and dividend checks when I was twelve, and when I was at Jesuit High, I worked after school, while I was in Loyola, I worked and did a little bit of everything. Then, I came back full time in '48.

Q As far as your experience is concerned, what has been your experience in [23] connection with realty companies, real estate brokers calling Security or coming to see Security about loans for prospective customers for themselves?

MR. WEGMANN:

Again, object to the form of the question.

THE WITNESS:

Well, actually, when they have a loan, they all call. They all solicit rates. On every sale that comes in, the agent makes their commission when the loan is approved, according to the real estate agreement. Consequently, you do get a lot of calls quoting rates. They shop or whatever. This is a daily practice that means nothing to us. Our loans are based entirely upon the credit of the person, the appraisal of the property, and, of course, their credit report that comes in to us, we underwrite ourselves.

EXAMINATION BY MR. NELSON:

Q It has been your experience that real estate brokers and representatives of the real [24] estate companies do call your company to solicit rates?

A Everybody calls. There are fifty calls a day asking what is your rate. Everybody calls.

Q What are they talking about when they ask you what is your rate?

A You get calls from a lot of savings and loans, checking our rates out to be competitive. We might call other savings and loan institutions to see what their rates are to be competitive. We get calls everyday to quote today's rate.

Q What is today's rate?

A For residential, eight and three-quarters and eight and a half and one point. It depends on how we read the file and if the compensating balances are with us. If a guy has money with us, we give him a better rate. If he keeps it on six and a half, we balance off ratio wise. We might give him better than eight and three-quarters, if he has \$60,000.00. It is just based on how [25] that file is going to read, and what that man wants to do.

From our experience, to eyeball a customer, we don't do anything that we can't eyeball a customer. When you are extending credit, you want to talk to a guy and see how he shapes up, what he does.

Q On occasions, when you eyeball a customer, so to speak, as you described it, is the real estate agent with him?

A No, they are a good taxi cab to bring him down, get him and bring him in there and talk with us. Some sit there, and some don't. You prefer them not to sit there, because, frankly, making a loan is none of their business, the real estate agent. I don't mean that to be



derogatory. It is not the agent's job. We do the underwriting and make the loans and approve the loans, not the agents. I say this, many times, but some of them sit there, but very few. They will go and sit in the waiting room while we talk, because you [26] do talk over private things. It is none of their business what your own personal financial statement is. That is how we do it.

Q Mr. Miranne, you were asked if you could bring a copy of the forms used for loan applications and the form used for the closing, and do you have those?

A Yes. (Indicating)

Q I have just been presented two forms which satisfy the subpoena, and I will mark them for identification as Miranne-1 and Miranne-2. Miranne-1 is the application and the residential loan application, and Miranne-2 is the bill of sale.

MR. WEGMANN:

Could I see those?

This document may be entitled bill of sale, but it certainly is not a bill of sale or act of sale form.

THE WITNESS:

No, that is just a closing statement that they asked for.

MR. WEGMANN:

[27] Would you distinguish that, please?

THE WITNESS:

On Exhibit B or 2, this is a bill of sale which we use in order to show the closing cost, the purchase price, credits and loan from the association.

Now, when you say bill of sale, we don't call them that here, it is, of course, an act of sale. This is just a bill of sale of the closing cost. The other exhibit is a residential loan application, and we use this in all commercial and everything.

EXAMINATION BY MR. NELSON:

Q Mr. Miranne, in connection with the Miranne No. 2, the bill of sale, how long has this form been used by Security?

A Twenty-five years.

Q The items listed on the left hand side, they have been on this sheet for twenty-five years?

A We have a couple of things — but — yes.

MR. WEGMANN:

We are all attorneys, and we know that is not a bill of sale. It might [28] be entitled that, but as the witness just testified, that is nothing but a document evidencing the things involved. I want to keep the record straight.

MR. NELSON:

That is agreeable. I will refer to it as Miranne No. 2.

## EXAMINATION BY MR. NELSON:

Q In connection with Miranne No. 2, is there a line, an item, called agent's commission, and is that actually the agent's commission?

A The amount of money, earnest money, posted by the purchaser to make the transaction final, in so far as the agreement to purchase is concerned.

Q The agent referred to is real estate agent?

A Yes.

Q And whatever agreement he has with his principal?

A Right, because you have to have that on the form, because that is maintained by the agent in a non-interest bearing account, and when we go to the sale, they have to come in and account for the [29] money they were holding.

Q On the real estate agent, does he appear at the act of sale?

A They are holding the commission, yes.

Q Is it not a fact that the agent's commission is usually contracted for in terms of a percentage?

A Oh, yes, according to the real estate agreement.

Q As part of the duty of closing these acts and dispersing money, it is part of the responsibility of the man closing the act to be sure that the correct amount for the agent's commission is handled, is that correct?

A Correct.

Q Has it been your experience that the agent's commission is not due until after the loan is nailed down and closed?

MR. WEGMANN:

Object again to the form of the question.

M.R. VAUDRY:

Unless you are talking about a specific transaction, as calling for [30] speculation of the witness.

THE WITNESS:

Well, according to agreements that I have seen, it usually stipulates that the agent's commission is earned upon the acquisition of the loan, the approval of the loan. That is what I read.

(Off the record)

EXAMINATION BY MR. NELSON:

Q Some additional figures were brought in to you, and would you tell us what they are for?

A With regard to money borrowed from the Federal Home Loan Bank, at the end of each year, from 1972 to 1976. At the end of 1972, we had two million borrowed. At the end of 1973, we had four and a half million borrowed. At the end of 1974, we had twelve million two hundred and forty thousand borrowed. At the end of 1975, we had fifteen million twenty-nine thousand five hundred borrowed. At the end of 1976, we have twenty million seven hundred [31] and twenty-nine thousand five hundred.

Now, let me add, those rates within the year do fluctuate. In other words, we pay them down, and we



borrow again, and we pay them down, and we borrow again. Those are the figures at the end of the year of the borrowed money we had with the Federal Home Loan Bank in Little Rock.

Q Approximately how many times a year would you say on an average from '72 to '76 would the borrowing be made?

A Four or five times a year. I would say at the dividend period.

Q Sometime during the year it would go up and drop?

A I would say the figures I gave you for '76 was the highest it has been. It may drop down, but that is the highest.

(Off the record)

THE WITNESS:

Well, I think you asked me a question about the number of notes pledged?

MR. NELSON:

[32] Right.

THE WITNESS:

Against the advances from the Federal Home Loan Bank?

MR. NELSON:

Right.

THE WITNESS:

In 1972, we pledged three hundred and twenty-two notes for six million nine hundred thirty-six thousand two hundred fifteen dollars. In 1973, we pledged three hundred ninety-one notes for a total of nine million one hundred thirty-seven thousand four hundred eighty-five. In 1974, we pledged eight hundred ninety-nine notes for a total of twenty-two million six hundred forty-five thousand three hundred ninety-five dollars. In 1975, we got pledged nine hundred twenty-five notes for twenty-three thousand eight o one five twenty.

MR. NELSON:

Twenty-three thousand?

THE WITNESS:

[33] Twenty-three million, I beg your pardon. In 1976, a thousand and forty-seven notes for a total sum of twenty-seven million four hundred eighty-four thousand one hundred twenty-one dollars.

MR. NELSON:

Thank you, Mr. Miranne.

EXAMINATION BY MR. NELSON:

Q Mr. Miranne, does the Security Homestead belong to any federal organizations?

A We belong to the National Savings and Loan League and the U.S., both.

Q Do they have a yearly convention?

A Yes, they do.

Q Both organizations?

A Yes, both organizations have conventions.

Q To your knowledge, on the national level, is there any joint effort made to hold conventions together or joint meetings between the National Savings and Loan League or the National Savings and Loan League of the U.S.?

A No. There are two National Savings and Loan Leagues. One is the United States [34] Savings and Loan League, and the other answer to that is no.

Q Do any of the organizations meet with representatives of organizations of realty companies?

A I would say no. They are just trade associations for the trade, savings and loans.

Q Are there any associations that operate locally, associations of homesteads?

A Yes, the New Orleans Savings and Loan League.

Q Any others?

A That is the only one. We have the state league, of course.

Q Do you know who is the president of the New Orleans Savings and Loan League?

A I can get it for you. I would be guessing —

Q Are there any state organizations?

A Yes, the Louisiana Savings and Loan League.

Q Does the New Orleans Savings and Loan League meet during the year?

A Every Thursday.

Q Where?

A At the International House.

Q Are there any representatives of real estate [35] companies or realtors present at any of those meetings?

A Other than to make a talk, but they are not invited to join.

Q There have been occasions that they may talk on some subject?

A To make a talk, but they are not associate members.

Q To your knowledge, has any representative of the New Orleans Savings and Loan League appeared before realty company organizations to give talks?

A I would imagine yes. All of us have, at one time.

Q These talks generally deal with what?

A Well, it is on loan procedures, the market, the way it is today, the prognosis as to the future, what money is going to do, what do we find the next year — already — we are asking that question — what is the position of the savings and loan in so far as the future market is concerned. It is like a general information deal that they do do, yes.

MR. NELSON:

[36] Thank you, Mr. Miranne. Maybe some of these other gentlemen might have some questions.

EXAMINATION BY MR. WEGMANN:

Q Mr. Miranne, what role does the real estate agent play in obtaining a loan?

A No role whatsoever, other than merely to bring the person down here. You mean to refer him to



Security as a possible source of obtaining the loan he is seeking to obtain?

Q That is correct.

A They usually bring them down, and in many instances, they do not bring them down. We basically do not need the realtor at all to bring him down, and basically, we would prefer just to talk directly to the borrower, because it is what the borrower says and what his track record is and credit position and what his earnings are and investments are, that is what we go on for the basis of the loan, plus the appraisal of the property. And, the agent may not like me to say this, but they play no part other than [37] to get them to us. In our business, Security Homestead, I would say that sixty to seventy per cent of our business is referral by services we have rendered. Frankly speaking, in this town, the rates are all the same around the corner. One quotes this, and they all quote it. If you cut an eighth of a point, everything moves. It is just that you have to sell your savings and loan today, basically on how you service the people and how you treat them. It has been good for us. I am not bragging, but we service them nice, and they may refer their children, their brother or whatever to us. I venture to say that sixty to seventy per cent are referrals by loans we have made to people.

Q What role if any does the real estate agent play in the homestead granting or not granting the loan?

A They would play no part at all. In fact, it has always been my feeling and my policy, when I underwrite a loan, as a member of the committee, I underwrite [38] it basically on what the potential borrower

has to present to us. I would say they play no role other than a person to get them to us and sit them down, and that is about it.

Q How many homesteads are there in this city?

A Thirty-eight, my last count.

#### EXAMINATION BY MR. VAUDRY:

Q Mr. Miranne, you indicated that in some instances, a broker brings prospective borrowers to the homestead, and I think at one time you said that was just a taxi cab service?

A I didn't mean to be facetious. They get them to us, and once they get them to us, that is as far as they go, as far as Security Homestead is concerned.

Q Would you know in the instances you were referring to whether these are cases where Security Homestead, as such, has been referred to the buyer by the broker or when the buyer has simply chosen Security Homestead as the place that he wanted?

A I would say sixty to seventy per cent, the [39] borrower has selected Security.

Q Could you tell us, and I hope I am not asking you for some figures that you don't have, but could you tell us the number of volume or amount of deposits from, you call them investors, that Security had at the end of each of the years, '71 through '76?

A I could get you that. I can give you basically what we have right now, as of the end of —

Q I am talking about dollars.

A We have thirty-six thousand five hundred and

twenty-seven savings accounts, for a total of a hundred and seventy million four hundred eighty-three thousand five hundred sixty-one dollars and ninety-seven cents.

Q In terms of annual statements, it appears on —

A I can get you that answer. It is no problem to get that. That is what we were this year. We just finished, in fact, today.

Q I would like to have that on the record.

A I will get that for you.

[40] MR. WEGMANN:

For those years in question?

MR. VAUDRY:

'71 through '76.

MR. WEGMANN:

A copy of the annual statements, and I would like to make it as part of the record the annual statements of the Security Homestead Association and mark the same Defendants-1, 2, 3, 4 and 5 and have them attached to the deposition.

EXAMINATION BY MR. VAUDRY:

Q Would it be a fair statement to say that in your opinion, a realtor's services are not essential to the making of a loan through Security Homestead?

A It would be a fair statement to make that, yes, because we make loans to anyone regardless of race,

color or creed, if they qualify under the guidelines which we have.

Q Now, you indicate that from time to time a certain number of loans are packaged up and sold to what you referred to as [41] Freddie Mac?

A Yes.

Q Your answer to that question is yes?

A Yes.

Q In those instances, those loans that are packaged up and sold are all complete real estate transactions?

A Yes.

Q Everything that has to do with closing the loan and conveying the real estate to the buyer has been completed?

A Everything has been completed. It is a finished loan registered record.

(Off the record)

THE WITNESS:

The president of the New Orleans Savings and Loan League is John Marque. That is the New Orleans Savings and Loan League.

EXAMINATION BY MR. VAUDRY:

Q As I understand it, the figures that you gave for VA and FHA loans were, the small amounts were, in fact, in error, because some were miscoded?

A No, let's see, our figures that we have in [42] FHA loans are five, seventy-three thousand six hun-



dred and fifty — I didn't read that — we only have three FHA loans on our books and two were miscoded. They were made in 1954 and 1955. The amount closed in 1954 was nineteen thousand for one loan, and the amount closed in 1955 was thirty-seven thousand eight hundred and seventy-five for two loans. The present balance of FHA loans on our books, at this time, is twenty-one thousand nine hundred sixty-seven dollars and forty-four cents.

Q When you say FHA loans, and you refer to one VA loan, this is the amount of the loans as it stands with respect to Security Homestead, is that correct?

A Correct.

Q It isn't the portion of the loan that may be guaranteed by VA or FHA?

A No, in other words, they guaranteed it up to seventeen five, and we lended all the money. They gave the guarantee.

Q The amount of guarantee is something less [43] than a small —

A I think not, the VA loan was forty-seven thousand five hundred, and there is one loan guaranteed under that, and that would be seventeen thousand five hundred.

Q Does the homestead, Security Homestead, Mr. Miranne, require any researching or checking of titles to the property that secure the loans that are made, the real estate loans?

A Yes, we do.

Q And in what fashion is this obtained?

A What usually happens is in every case that we get, we usually take and research the title back, usually

fifty-two years, except if we go into a chain that we have done before, and we just usually stop, because that has been done already. In every case, we examine the titles to the property, and in every case, our loans are approved based on merchantable titles based on surveys that have been obtained to show that the property lies within the proper building lines, with no [44] violations of any restrictions or regulations or ordinances, et cetera. After that report is made, it forms a part of the loan file.

Q Is it your testimony that in every case, that Security bases the making of the loan upon a title examination by a local attorney?

A Right.

Q Is that a transaction which, in any instance, requires any title insurance?

A In some instances, with Freddie Mac, in meetings with Freddie Mac, Freddie Mac had agreed to take your title opinion of the savings and loan, then, as time goes on, we do — I am not an attorney anymore, just the president, but the legal firm does have a security title of Baltimore, and an agency for security titles of Baltimore, and when we originally write it, we write it only on opinion of the attorney. If we sell the paper, we supplement that with a title insurance, mortgage insurance only.

[45] Q How long has this been?

A Two and a half years.

Q With respect to the examination of the title, does the realtor who may be involved in one of the real estate transactions, play any role with respect to that?

A No, he does not.

Q Now, you indicated before that you estimate, I believe, some seventy per cent of the business that came to Security in so far as loan applications, borrower loan applications, came from how would you describe it, in family referral type situations?

A In house referrals. I mean borrowers on our books now. Sixty to seventy per cent is my estimate.

Q You don't have any figures or statistics?

A No, we don't keep it. All I can say, this is my opinion, based on seeing every loan that comes through this company, and based on knowing the general part of everything that goes through this company, and based on the personal attention that we give, this is my [46] opinion.

Q Now, with respect to the other thirty per cent of whatever it is, thirty or forty per cent, would you have any data that would indicate the part of that percentage that may come to Security through a referral from a real estate broker?

A No, no, we don't keep that. In other words, we don't follow it up. All it is is a feeling that I have for this business. I see the people and the names and the people that call me personally in this business. In our company itself, it kind of starts at the top and goes down to the bottom. That is a little different from other companies that start at the bottom and go to the top. In our company, we try to maintain a personal touch with everybody, because service is the only thing that can bring it to us, because the rates around the next corner and the next door are all the same.

MR. WEGMANN:

[47] In connection with the testimony of this witness, we would like to mark these statements. These are statements for the period ending December 31st, 1972, and I would like to mark this one Defendant-1, and for the period ending June 30th, 1972, we will mark it Defendant-2, and for the period ending December 31st, 1971, we will mark it Defendant-3, and for the period ending June 30th, 1971, we will mark it Defendant-4, and for the period ending December 31st, 1970, we will mark it Defendant-5, and for the period ending June 30th, 1970, we will mark it Defendant-6.

The annual report of 1974, we will mark it Defendant-7. For the period ending 1975, we will mark it Defendant-7, and for the period ending 1973, we will mark it Defendant-8, and ask that they be exhibits to the witness's deposition.

EXAMINATION BY MR. NELSON:

Q Mr. Miranne, in connection with these loans [48] on residential property that you have testified to, can you give us an expression of your opinion as to the percentages of loans during the period '71 through '76 that were made without the payment of an agent's commission?

A No, sir.

Q Now, in order, if I wanted to secure that information, I would have to look through each one of the closing statements, is that correct?

A That is correct.



Q Now, isn't it a fact that these people that are referred up here, regardless of what reason they come, they are the ones that usually come up to make a loan, and they are not usually the owners of the property?

A Not the owner, the purchaser.

Q The real estate commissions due to the real estate companies are usually paid by the owner?

A Correct.

Q The people that come up to see you are not really responsible for the real estate [49] commissions?

A No, they are not responsible.

Q Isn't it a fact, when you start accumulating information for the purpose of checking titles or whatever, you have, at some point, to contact the owner or his representative?

A No, we usually make a requirement, when they sit down to make a loan, that we be furnished a title by the owner.

Q The agent may bring it to you?

A Yes.

Q It is simply a practical matter that usually the real estate agents furnish this company with information like the title to the property or whatever information?

A In many instances.

Q If you want title to properties, you would call the agent and not the owner?

A We don't usually call. When they sit down to make a loan, we require that they bring us back a title. We would say, Mr. Nelson, we need the title to the property. Usually, when they come in to make a loan, actually, they have the [50] title already, because the

agent knows they have to have the real estate agreement and title. If they don't have it, we require they bring it back to us.

Q Isn't it a fact that you are also interested in knowing how much down payment they have already made?

A Yes, that is taken from the real estate agreement.

Q In the vast majority of cases, in excess of ninety per cent of the cases, in which people come up here, no matter who refers them, this company has to confer with a real estate agent?

MR. WEGMANN:

Object to the form of the question.

MR. VAUDRY:

You are saying ninety per cent of the cases?

MR. NELSON:

I am talking about the vast majority of cases.

MR. WEGMANN:

You are testifying instead of [51] interrogating the witness. I will ask you to rephrase it.

(Off the record)

MR. WEGMANN:

You are testifying instead of interrogating the witness.

EXAMINATION BY MR. NELSON:

Q Do you understand that as a question?  
Tell me and I will reword it.

A I can answer the question. As a lawyer, I understand what is happening here. Number one, in many instances, we do contact the agent for something during the course or the agent contacts us. There is a rapport, in other words, with the agent, whether it is ninety, eighty, seventy, I do not know.

Q But, as a practical matter, in this city, the real estate agent does play a part in the ultimate closing of the loan?

MR. VAUDRY:

Object to the form of the question.

MR. WEGMANN:

Again, I state for the record, Counsel, you are testifying instead of [52] interrogating the witness.

MR. VAUDRY:

My objection is you are calling for an opinion of the witness.

MR. NELSON:

Are you saying he is not qualified to give opinions in this area?

MR. VAUDRY:

I don't think the witness is being interrogated as an expert witness.

MR. NELSON:

I have been under a misapprehension. I thought that is why we were deposing him.

(Off the record)

EXAMINATION BY MR. NELSON:

Q Mr. Miranne, is that not true?

A The real estate agent does play a part in the ultimate closing, but plays no part in the underwriting of the lending. They may get a title for you. They may do this, and get the title for you, and they may pick up some papers and bring it to you, but they play no part as far as the underwriting of the loan [52] by the association.

Q Now, the investors, you were asked about the number of investors, and you said thirty-six thousand five hundred twenty-seven actually are investors, and is it the same as stockholders? How would you define it?

A An investor is a stockholder, because we are a mutual, and the investors are the owners of the homestead.

Q Have these people made loans through here?

A No, as far as an investor, you are talking about a person who has put money in the savings and loan, and he is entitled to a vote each year, in January. The investors are actually the owners of the company. They have invested the money that you lend. The State Law calls them stockholders. If they have \$100.00 with us,



they have one share of stock. That is just our State Law, as that phase of mutuality. That is why they get it.

Q Would you give us, Mr. Miranne, an idea of the federal regulations that control [54] Security Homestead, a general idea?

A Well, in Louisiana, there is a dual system. We are a State chartered institution, and in my opinion, and in the opinion of many, many attorneys throughout the country, state chartered institutions are only accountable to the Federal Home Loan Bank, in order to get the insurance of shares from the FSLIC. This is for states. Mr. Kenneth Pickering, he is the man that controls the operation of the savings and loans and banks in this state. The only reason we have to comply with the FSLIC, Federal Savings and Loan Insurance Corporation, is because of our insurance of shares.

Now, the federal savings and loans in this area are strictly under the complete jurisdiction of the Federal Home Loan Bank and the Federal Home Loan Bank system.

Q In connection with the operation of Security, is Security audited yearly by any agency of the Federal Government?

[55] A Yes, every fourteen months by the Federal Home Loan Bank.

Q Do you have to pay a fee?

A Yes.

Q To whom?

A The Federal Home Loan Bank, Ninth District, Little Rock.

Q In connection with the financial statements we have presented, marked for identification previously,

in so far as the assets are concerned, the U.S. Government and other investment securities in the amount of nine million eight hundred fifty-three thousand nine hundred twenty-four, and briefly, what does that represent?

A The liquidity which we must maintain under the FSLIC rates. That is what you call liquidity, which is convertible into money within twenty-four hours, and at the amount of that is seven per cent to share capital.

Q Where is that held?

A We have it in bonds, and I think the First N.B.C., in the vault.

[56] Q The United States and other investment securities that means United States bonds?

A Yes, they maintain that we have to maintain seven per cent of our share capital, that is, invested money, with us in order to pay off in case of withdrawal of money.

Q That is a federal regulation?

A Right.

Q Now, stock in Federal Home Loan Bank, what does that represent?

A In other words, in order to be a member of the Federal Home Loan Bank, in order to borrow, they have systems, one is the FLIC, federal insurance on our shares, and the other is the Federal Home Loan Bank, like a subsidiary of the Federal Home Loan Bank. In order to borrow money, we have to be a member, and every time you borrow, you pledge notes. If you borrow a million, you have to pledge notes, and they make requirements that you buy more stock. You have

to be a member of the [57] Federal Home Loan Bank in order to borrow money. As you borrow more money, you have to buy stock.

Q The FSLIC pre-paid premiums —

A That is the counterpart of the FDIC, Federal Savings and Loan Insurance Corporation, and that is the corporation which is a subsidiary to insure our shares up to \$40,000.00 for each account.

Q You testified —

A Excuse me, just a minute, you asked a question about the premium you pay, and that is what we pay to get the insurance. That is what we are talking about.

Q You testified earlier that the notes used as security or notes that form a part of the complete real estate transaction, do you remember?

A This is the notes used for borrowing. That is the completed —

Q That money that is borrowed is used to lend for other real estate transactions?

A That is right, or to take care of commitments that we have. If you borrow from the [58] Federal Home Loan Bank, you have to say, if you borrow for a commitment or for making future home loans.

Q It is a cycle?

A That is right, just like the local banks or the FDIC. We are with the Federal Home Loan Bank.

Q Now, you mentioned a number of associations, organizations that Security Homestead Association is a member of, and in the back of this yearly report, it lists the Federal Home Loan Bank of Little Rock, the Federal Savings and Loan Insurance Corporation, and

where is the Federal Savings and Loan Insurance Corporation domiciled?

A Washington.

Q D.C.?

A Yes.

Q What about the National League of Insured Savings Association and the United States Savings and Loan League?

A D.C. and Chicago.

Q The American Savings and Loan Institute, do you know where that is domiciled?

[59] A I imagine in D.C. That is an institute used to train people in different phases of the operation of savings and loan.

Q And the Controllers Society for Savings Institutions?

A Only controllers belong to that. That is not a government function at all.

Q I notice Security is a member of the Home Builders Association of Greater New Orleans, Inc.

A An associate member.

Q Do you pay dues?

A Yes.

Q Do you have a vote in the organization?

A I don't believe we do.

Q Do you attend meetings?

A We send somebody. We actually attend the functions that they have to create business.

Q To your knowledge, are relators also members of this same organization?

A I do not know definitely. There may be a pro-



vision that they can be an associate member. I don't know that.

[60] Q At any of their organizational meetings, have you ever come across representatives of realtors?

A I have never been.

Q How often do they meet?

A They have different functions that they have, maybe three times a year. It will say that they may get together and have a talk by someone.

Q And the Savings Institutions Marketing Society of America?

A We have a Marketing Department, which I have a director for, Mr. Bourgeois, and that is a private deal, that is not federal.

MR. NELSON:

Thank you very much.

# CONSOLIDATED FINANCIAL STATEMENT of the

## SECURITY HOMESTEAD ASSOCIATION

As of the Close of Business on June 30, 1976

### ASSETS

First mortgage loans .....	\$152,812,292
Loans secured by shares of this Association .....	1,482,268
Family Finance Center loans .....	12,160,366
Real estate owned .....	776,640
Cash, U.S. Government and other investment securities .....	11,874,653
Stock in Federal Home Loan Bank .....	1,252,500
FSLIC prepaid premium .....	454,420
Accrued interest receivable .....	393,186
Office buildings .....	4,575,155
Furniture, fixtures and equipment .....	298,081
Other assets .....	<u>4,939,851</u>
TOTAL ASSETS .....	<u>\$191,019,412</u>

# LIABILITIES AND RESERVES

Optional, full paid, single payment shares .....	\$153,300,276
Loans in process .....	2,162,754
Federal Home Loan Bank advances .....	13,729,500
Interest accrued on Federal Home Loan Bank advances .....	89,027
Borrowed money from banks .....	4,680,000
Interest accrued on borrowed money .....	17,338
Advance payments by borrowers for taxes and insurance .....	1,305,380
Deferred income .....	3,647,544
Other liabilities .....	3,808,759
RESERVES .....	8,278,834
TOTAL LIABILITIES AND RESERVES .....	<u>\$191,019,412</u>

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## [418] UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Jan. 20, 1977

Deposition of ANGEL MIRANDA, taken in the office of Messrs. Nelson, Nelson & Lombard, Suite 1100, 344 Camp Street, New Orleans, Louisiana, on Monday, January 3, 1977.

APPEARANCES: (Omitted)

\* \* \* \*

### [4] EXAMINATION BY MR. NELSON:

Q Your full name is what, Sir?

A Angel, A-N-G-E-L, Miranda, M-I-R-A-N-D-A, the second name.

Q And your occupation?

A I am Area Economist in the HUD Area Office, in New Orleans, Department of Housing and Urban Development.

Q What are your duties as Area Economist?

A I am advisor to the Area Director of Housing Marketing Analysis, and, well, there are different responsibilities. For example, I am supposed to determine the income level for subsidy for admission to subsidy housing, and also I am in charge of establishing parental projects, at least, to advise. He may agree or disagree with me.

Q In connection with the various programs of HUD, FHA and HUD we are talking about the 203 (b)



and 221 (d) (2), is it within your duty to determine how many cases have been opened by HUD, let's say over the last four or five years under each one of these programs?

[5] A I am supposed to have all this information available. If it is not available, it is because it is not provided by the central office. I am supposed to find out some place, so I need it for any analysis.

Q My question, they are going to concern themselves with Orleans and Jefferson Parishes, all right?

A Yes.

Q First of all, I am going to show you an affidavit signed by you on April 22nd, 1976, together with a number of attachments, and I am going to mark this for identification, Miranda No. 1 for our record. You have read through this affidavit, is that right, Mr. Miranda?

A Yes, I did.

Q And was this affidavit substantially correct?

A Yes, sir, it is substantially correct, but remember, it is an opinion.

Q I would like to include in the documents that you have here and include information and knowledge you may have, [6] and could you tell me, let's say 1975, how many homes were residences for one to four units were insured under the 203 (b) in Orleans and Jefferson Parishes, do you have this anywhere in your records?

A Yes, 1974?

Q '75, let's start with '75.

A The total number of housing units insured by our area office in the whole jurisdiction, two thousand seven hundred and thirty.

Q What documents are you reading from?

A 1975 document.

Q Schedule 130 A, you are reading from Schedule 6, we have on this document on the affidavit that we have here for your affidavit each one of these documents are listed and identified as a schedule?

A Yes.

Q For the record, you are reading from Schedule 6, within the jurisdiction, in the New Orleans Area Office, in '75, you had how many homes insured?

[7] A In one single year, two thousand seven hundred and thirty in the jurisdiction.

Q Approximately how many of these two thousand seven hundred and thirty were in New Orleans?

A In New Orleans, probably about fifteen to twenty per cent.

Q How many in Jefferson?

A I would say from twenty to twenty-five per cent, in 1975.

Q Yes, sir, so, in Orleans and Jefferson, if we would add those two percentages —

A About forty-five per cent in both.

Q What about '74?

A Well, I would say it is about the same

Q Schedule 5 is for 1974?

A Yes, right there. (Indicating)

Q And you would say about the same percentage of those listed on Schedule 5 were insured in Orleans and Jefferson Parish?

A Yes, sir.

Q What about 1973, on Schedule 4?

A I would maintain the same percentage, maybe a little different, but it should be [8] about the same.

Q Would you say '72 and '71 were about the same thing?

A Yes, sir.

So, in the five year period, I would say that from, in Orleans, from fifteen to twenty per cent, and in Jefferson, from twenty to twenty-five per cent.

Q That percentage is a percentage of the number that you have on these various schedules?

A Yes, agreed, very closely.

Q Now, on Schedule No. 2, you have some dollar figures. These dollar figures represent what year?

A Well, we have two parts. We have information for one single year on single homes insured by HUD, in the whole state. You can see the table divided into two parts, mortgage and loan program activity for the year 1973, and then, mortgage and loan program activity cumulative from 1934 to 1973.

Q Right.

A The first part is for the one, single year [9] 1973, we insured in New Orleans three hundred and twenty-five homes.

Q That is New Orleans?

A Yes, and in Jefferson, one thousand eight hundred and ninety-six houses.

Q Those are residences?

A Yes, that is what I told you, maybe, but in New Orleans jurisdiction, about fifteen to twenty per cent in 1973, and in Jefferson, about twenty to twenty-five per cent.

Q Do you have schedules at least the documents for '71 through '75 similar to the ones you have for '73?

A Like this one? No, sir, not here. I have 1972, but not '71.

Q What happened, are the ones for '73, '74 and '75, are those available anywhere?

A Well, '73 is this one, and '74 is probably available in the central office, but we don't have copies here in our area office.

Q Mr. Miranda, have you ever made any study of the percentage of FHA/VA insured homes as against the total number of [10] residences sold in this city?

A You are talking about on single homes?

Q Yes.

A Well, we prepared market analysis, housing market analysis, and the basis is the building permits issued by the different state agencies, Jefferson, Orleans, St. Tammany and St. Bernard, when we add up all those building permits by years, easily, we can determine the amount of houses constructed in the particular year. At this moment, I don't have an idea of how many housing units have been constructed from 1970 to '75.

Q Do you have that information in your office?

A Yes, sir, I have that.

Q Do you also have the information as to the total number of new residences constructed, what percentage is FHA/VA insured?

A Of the total, including private and public?

Q I am talking about residences. I am not interested in public. You are talking about public housing?

[11] A Well, no.



Q You know, the homes are insured either by the homestead, what we call conventional insurance, and also the houses are also insured by the Federal Government through HUD or VA or FHA, and we put them all together, FHA, VA and HUD, we come up with the total, what are the percentages of HUD compared with the whole totals.

A No, sir, we don't have any information on that detail. I don't think we can tell you how many HUD insured or an estimate on the whole volume of construction of the area.

Q What about taking into consideration the volume sales, not of new construction, but the homes that are sold in this city, let's say, a five year period from 1971 through the end of '75, would you have any information in your office concerning the percentage of FHA/VA approved, I mean, insured homes for those mortgages?

A I don't have at this moment that information [12] but it could be determined.

Q It could be determined?

A Yes.

Q Could you get that for me? I don't mean right now, I mean like tomorrow.

A What I am telling you is that the information is available. Like I told you, we can determine, estimate on the basis of the building permits issued, and, of course, what amount of those are HUD insured and VA, and so, the balance may be homestead.

Q I am not only talking about building permits, I am talking about existing homes that are sold in the market, homestead may be one, from one year to twenty

ty years, that are sold, if those homes were FHA/VA insured, on those homes?

A No, you have to base everything on the building permits for one simple reason. As soon as anybody obtains a building permit for construction of new homes, three months later, that permit, it is voided if not constructed, or if the home is under construction, if we obtain [13] the whole amount of the building permits in one single year, three months later, we know how many have been constructed or under construction. You can see what I mean?

Q Do you have any record of homes that are sold and are not constructed this year?

A Not, not an exact number, just an estimate. I don't think nobody can have that information.

Q Would you have any documents in your office upon which you would depend in order to give an estimate?

A Yes, sir, building permits, and that is the only possible way.

Q The building permits, as far as you are concerned, is the only possible way?

A Yes.

Q If you don't understand this question, let me know, but I have been owning my own home for eight years. If I would want to sell my home this year to Mr. Smith, and Mr. Smith could buy it, and he probably, if he qualifies, secure a FHA/VA loan?

[14] Yes.

Q My question is, do you have any records in your office, the New Orleans office, as to how many of these loans have been insured by HUD or VA or FHA?

A Well, not what you mentioned to me, no, I don't have it, but we have an office, a division in our area of-  
fice that could get that information.

Q What is the name of that?

A Well call the office, let me see, it is, I am trying to recall the name — the Home Mortgage and Credit.

Q Do you know the name of the person in charge of that?

A The person in charge is Erin Hogan. He is the head of the Section.

Q He is located here in New Orleans?

A Yes, sir. I think they can probably, they may have the information on the total amount of mortgages in dollar amount and insured up to date.

MR. NELSON:

In connection with this witness's testimony, I would like to attach to [15] his deposition his affidavit identified and signed by him, together with the schedules 2 through 8.

EXAMINATION BY MR. NELSON:

Q Excuse me, Mr. Miranda, in connection with the schedules, you have Schedule 7, and that is this document? (Indicating)

A Yes, sir.

Q What is that, what is that Schedule 7?

A Schedule 7 is the insurance of multi family project. Just a moment ago we were talking on single homes. Now, we are talking on multi family project.

Q These are residences, multi family houses?

A Housing projects.

Q Two family, three family, four family?

A No, we are talking of housing complexes of more than four units or above, but in this particular case, I don't think we have any of the four units. We are talking about eighty or more units. I think we have sixty units.

\* \* \* \*

[421] UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Feb. 14, 1977

Deposition of JULIAN O. HECKER, JR., taken in the office of Messrs. Nelson, Nelson & Lombard, Suite 1100, 344 Camp Street, New Orleans, Louisiana, on Friday, January 7, 1977.

APPEARANCES: (Omitted)

\* \* \* \*

[4] EXAMINATION BY MS. SAIK:

Q Would you state your full name, please?

MR. O'CONNOR:

Note for the record that we have filed a motion to squash the subpoena that was served upon the witness that has been noticed for February 2nd, 1977. However, pursuant to the discussions that we have had as



far as the production of documents, we are going ahead with the deposition to accommodate the parties.

MS. SAIK:

I just want to ask a few questions, introductory questions, and go through the documents that have been requested and determine what is available and what is not, without undue expense.

EXAMINATION BY MS. SAIK:

Q Mr. Hecker, what type of business are you engaged in?

A Mortgage banking.

Q What is the name of your business?

A Carruth Mortgage Corporation.

[5] Q Where is that located, Mr. Hecker?

A 3601 I-10 Service Road, Metairie

Q That is the main office?

A Yes.

Q Where are the other offices, located, if you have other offices?

A I don't know the exact addresses.

Q What parishes?

A Orleans, Jefferson, and we have one in Slidell, St. Tammany and Houma and Baton Rouge.

Q What is your position with Carruth Mortgage, Mr. Hecker?

A President.

Q How long have you been President of Carruth Mortgage?

A A little over a year and a half.

Q How old are you, Sir?

A How old am I — I was born in '33 — that would be what — Forty-two, forty-three —

Q Is Carruth Mortgage a Louisiana corporation?

A No, an Arkansas corporation.

Q In what states does it do business?

A Louisiana, Mississippi, Texas, and we are authorized to do business in Arkansas, [6] but we have not done it.

Q Is Carruth Mortgage a subsidiary of any other company?

A Yes.

Q What is the name of that?

A Laurel Mortgage.

Q Where is that domiciled?

A Louisiana.

Q Are you a subsidiary of any other corporations?

A Yes.

Q What is that?

A Mellin National Mortgage (spelled phonetically).

Q Where is that located?

A Pittsburgh.

Q Pennsylvania?

A Yes.

Q And what kind of business activities does Carruth engage in primarily?

A Mortgage-banking.

Q Could you give a brief description of what that entails?

A Well, we have loan acquisitions, that would be acquisitions of raw land, development of the land, construction, lender, [7] permanent lender, secondary financing.

Q As president, are you generally familiar with the aspects of the operations that you just described?

A Yes.

Q Now, as your Counsel mentioned at the outset of this deposition, you had been asked to bring with you certain documents regarding various aspects of your business. Are you able to comply with the request for copies of forms presently used for loan applications by Carruth?

A Yes, I have them.

Q May I see those, please?

A (Witness complies.)

Q Mr. Hecker, I think if you would just hand me each one and just give a brief description of what the document is, I would appreciate that.

A The first is a general credit questionnaire, which we take upon application, that gives us just the general information that we need.

Q I will mark this Hecker No. 1 for [8] identification. Does your company prepare this form?

A Yes.

The next is FHA form 2900, which is FHA's application form.

Q I will mark this for identification as Hecker No. 2. Is the form provided by the government?

A Yes.

Q Go ahead, Sir.

A The next is VA form 26-1802A, which is a VA application form.

Q I will mark this for identification as Hecker No. 3. Is this form also provided by the government, Mr. Hecker?

A Yes, sir. The next is form number 65, which is the conventional loan application form.

Q All right, I will mark this Hecker-4. Who prepares this form?

A We prepare all the forms, as far as, you mean who prints the form?

Q No, who actually, the information contained here is decided by your company?

A Yes, we prepare all the forms.

[9] MR. MC CALL:

Are you asking him who fills out the forms or who decides what information has been requested?

Do you understand the question that way?

THE WITNESS:

As I understood it, who fills out the form, is that what you are talking about?

EXAMINATION BY MS. SAIK:

Q The information that is contained on Hecker No. 4, in terms of information desired by your company, who has made the decision as to what questions or information should be obtained on this form and presently obtained on this form?

A I don't understand the question.

MR. O'CONNOR:

Who establishes the format for the form?

THE WITNESS:

This is a federal home loan mortgage form. To be frank, it is a [10] standard form.



MR. VAUDRY:

Which document, Pat?

MS. SAIK:

Hecker-4.

MR. VAUDRY:

For point of clarification of what you thought you were answering, do I understand your testimony to be with respect to all these forms that Carruth fills out the forms?

THE WITNESS:

That is correct, fills in the information, and for future clarification, number one is a questionnaire, and that is our form. We prepare the questions asked or the questions that we determined that we needed. The FHA and VA forms are standard government forms. We do not print the FhA or VA forms. We do print this form. (Indicating)

MS. SAIK:

Referring to Hecker No. 4.

EXAMINATION BY MS. SAIK:

[11] Q How long has this form been used by your company?

A Say within the last — a couple of years. I wouldn't know actually the estimate.

Q Another item, Mr. Hecker, directed a request for a document showing the names and addresses of home-

stead, real estate companies, brokers and realtors with whom your company is doing business or has done business since 1971.

Were you able to comply with this request?

A No.

Q Could you please state why?

A It is not really available.

Q Where would that information be contained, if it is available?

A We would have to dig, because we deal with many firms on various terms. If you are talking about solicitation to do business, we have solicited, I would think, hundreds of firms through letters, telephone calls, et cetera.

Q Where are these firms located?

A Throughout the country.

Q Mr. Hecker, do you have any, or aware of any [12] directories that were published by trade organizations that would contain the names and addresses of real estate companies, insurance companies, savings and loan or other financial institutions?

A Yes.

Q Could you give me the names of the directories that you know about?

A Well, I am not sure of the exact names.

Q Well, who were they put out by might be simpler to answer.

A I believe the Real Estate Board of the State put out a directory.

Q The state organization?

A Yes, the Louisiana State, I believe.

Q And that is, that contains names and addresses of whom, sir?

A Brokers and agents.

Q Does your company receive copies of this directory?

A Yes.

Q Approximately how many copies does your company receive?

A I really don't know. I believe one or two, [13] I am not certain.

Q Are there any other directories that you know about?

A You are talking for real estate agents?

Q And/or financial institutions.

A Well, of course, we receive the Savings and Loan League, which has the same thing as the — there is a Savings Bank Guide.

Q The Louisiana Savings and Loan League, does that contain addresses of realtors and brokers or savings and loan associations?

A Savings and loan associations.

Q Is that a state organization also?

A It is not a state as such, I think it is a savings and loan league, a group of savings and loans, I think.

Q A minute or two ago, you said that you dealt with many firms or solicited hundreds of firms outside of the state. Have you also solicited within the state of Louisiana?

A Yes.

Q What types of organizations do you deal with in Louisiana, or businesses or persons?

[14] A You are talking about from an investor point of view?

Q Who might you issue mortgages to, who might you resell your paper to?

A Primarily savings and loans or homesteads.

Q Have you ever solicited through realtors or brokers in Orleans and Jefferson Parishes?

MR. O'CONNOR:

Solicit for what, to place loans, make loans, what?

MS. SAIK:

It could be either one. I am speaking of the business.

MR. O'CONNOR:

If you would specify a little bit, it would be easier to answer the question.

EXAMINATION BY MS. SAIK:

Q Has Carruth ever contacted realtors or brokers in Orleans and Jefferson Parishes in connection with the offering of mortgage money available for the purchase of residential real property?

A From the point of originating single family [15] residences, loans, yes.

Q What form does that contact take?

A We have, more certainly within the last six months, started an approximate weekly bulletin that we put out, which is mailed to approximately three hundred agents and brokers, giving our current quotes.



Q Does this weekly bulletin contain any other information?

A Just quotes.

Q You are speaking of —

A Interest rates, discounts available on that particular day. We also make personal contact by solicitors at the real estate broker's agent's office.

Q How long have you been publishing this weekly bulletin?

A Approximately six months.

Q Have you ever distributed any brochures describing the services that Carruth would provide to realtors in Orleans and Jefferson Parishes?

A Yes.

Q Since 1971?

[16] A Oh, yes, several different kinds.

Q For the record, Counsel, I believe that through the testimony that we have just gone through, that plaintiff would be satisfied, in connection with the descriptions that Mr. Hecker has given, concerning the people with whom Carruth does business, in lieu of producing documents showing the names and addresses of all homesteads, et cetera, and we would consider this sufficient.

MR. O'CONNOR:

His testimony?

MS. SAIK:

Yes, sir.

(Off the record)

# EXAMINATION BY MS. SAIK:

Q Items three and four on the subpoena are concerned with documents which would identify mortgage companies, homesteads and mutual savings banks and insurance companies or government agencies with whom Carruth does business and also the volume of loans placed or applied and [17] also information concerning the volume of residential real estate loans carried by Carruth or placed with others has been requested.

Is any of this information available, Mr. Hecker?

A Not in the form of the question.

Q Would it be necessary to, for example, go through each loan application that was or each file —

A If you are trying to figure out when we originate and when we sold to specific investors, yes. We have computer print outs which we could request from a contractor that does our computing work, but it would not give you a date that we sold the loan to them, the detailed information you are looking for.

Q What kind of information, if you know, is presently contained in computer form?

A Interest rates, balances, payment numbers.

We have the names and addresses of the individuals.

Q Mr. Hecker, can you give us an approximate number of loans that your company closed [18] in 1976, residential loans?

May I, just for point of clarification, when I am asking these questions, I am asking for residential real property.

MR. O'CONNOR:  
Single and multiple?

MS. SAIK:  
One to four family.

THE WITNESS:  
Offhand, I don't know actually what number of loans. It is just under fifty-four million single family.

MS. SAIK:  
That is from 1976?

THE WITNESS:  
Right.

MR. O'CONNOR:  
That is in dollar volume?

THE WITNESS:  
Yes.

EXAMINATION BY MS. SAIK:  
Q Can you give the dollar volume for any of the years from '71 to '75, roughly?  
A I think last year was about fifty million, just guessing. I don't know prior to [19] that.  
Q Would any of this information be contained in your annual report?  
A I don't know whether the exact volume of residential organizations is, but we have that information available in other form.

Q Do you have, about in 1974, what was the total volume of mortgages placed, whether it was higher or lower than fifty-eight million?

A Lower.

Q Fifty million?

A I think it will be lower than that. I don't know, I just can't tell you.

Q Would this information be located on your financial statements for the years 1971 through 1976?

MR. MC CALL:

I think you already asked that question, and that it would not be available in the way you asked it.

THE WITNESS:  
I don't believe it is.

EXAMINATION BY MS. SAIK:  
[20] Q Turning back to 1976 then, you stated about fifty-four million loans were placed on residential real property. What parishes would this include, or do you know?

A I have no way of knowing. We have our offices in the parishes that I have answered before, and as I said, we originate out of those offices, and they could be in numerous parishes.

Q So, these figures you gave me was for the entire state of Louisiana, is that correct?

A I believe, again, I am not certain, but I believe that the fifty-four million is all restricted to Louisiana, yes. It could only be a minimal change, an insignificant change.



Q It is your testimony that it would be difficult to break this aggregate as to what was done in each parish?

A We don't keep it that way. We keep it by branch, but that doesn't mean it is restricted to a particular parish.

(Off the record)

[21] EXAMINATION BY MS. SAIK:

Q Mr. Hecker, what I am after here is trying to determine the number of mortgages issued and the volume of mortgages issued in Orleans and Jefferson Parishes from your company for the years 1971 to 1976. Do you have this?

MR. MC CALL:

I think we would be prepared to stipulate that it would be substantial.

MR. NELSON:

We want the number.

THE WITNESS:

I have no idea. I would agree with them, it is substantial.

EXAMINATION BY MS. SAIK:

Q It is your testimony that this information is not presently contained or kept by your office?

A What I said, it was kept by the branches, not the parishes.

Q How many branches do you have in New Orleans?

A We have one in New Orleans East and one directly across the river. I'm not sure if it is Orleans or Jefferson [22] Parish, the one in question, but there is at least one in Orleans Parish.

Q You have one in New Orleans East and one just across the river?

A Just across the border line. I am not sure if it is in Orleans or Jefferson.

Q How long would it take to get that information from these offices?

A What information are you talking about?

Q The information concerning the dollar volume and/or the number of residential mortgages issued for the years in question, 1971 through '76?

MR. O'CONNOR:

By parish or branch?

MR. NELSON:

By branch.

THE WITNESS:

I am not sure it is available. We just keep it as memoranda type thing, to know what the branch produces. I believe I could get it for you, but it would take some time.

EXAMINATION BY MS. SAIK:

Q What records would you use to obtain this [23] information?

A What records would we use? It would be hand computed.

Q It is your testimony that Carruth Mortgage does not keep an aggregate figure of the number of loans or mortgages issued each year?

A That is not what I said.

MR. MC CALL:

You asked him about branches.

EXAMINATION BY MS. SAIK:

Q You do have an aggregate figure for the state or total operation?

A That is correct, and we know how much is produced in each branch.

Q Where is that information kept, in the branch offices?

A It is kept in the branch offices, but we compile it in the home office.

Q Is it kept on computer?

A No.

Q Can you identify or give a description of the documents that that information is contained on?

A It is a hand computed total related to closing [24] in the month and just continually add it each month.

Q What department of Carruth is this kept in, accounting department, do you have an accounting department?

A The actual totals are kept by the secretary of the corporation. There is no particular department that keeps those.

Q Who is that, Sir?

A Mattie Toole.

Q Is she located in your office on Metairie Road?

A Yes, that is correct.

Q Mr. Hecker, could you provide to us, not at this time, but in a reasonable time the number and dollar volume of mortgages placed on residential real property for each branch of Carruth Mortgage Company in Orleans and Jefferson Parishes?

A Yes, I believe so.

Q In your opinion, Mr. Hecker, can you give us a rough approximation of the percentages of the number or volume of loans placed on properties located in [25] Orleans and Jefferson Parishes?

A Can we go off the record?

Q Could you state that on the record, please?

A We presently have three offices which are located either in Jefferson or Orleans Parishes. The production from these three offices comes from either Orleans or Jefferson Parish, and I would feel that somewhere between ninety and ninety-five per cent of the production of these offices would either be in the Parish of Jefferson or Orleans. Does that make sense?

MS. SAIK:

That is fine.

EXAMINATION BY MS. SAIK:

Q On the same information that we just have been inquiring about, the number and volume of residential loans in Orleans and Jefferson, what percentage of those loans would be guaranteed by government pro-



grams, such as, speaking of the Federal Housing Administration and/or HUD and VA or Veterans Administration?

A It varies from year to year. I can tell you [26] for the year 1976. For '76, it was approximately sixty per cent VA, and, then, about twenty per cent conventional and twenty per cent FHA.

Q For the years 1971 to 1975, could this information regarding the percentages be provided?

A I believe so.

Q Mr. Hecker, on the mortgages issued by your company, which are guaranteed by FHA or HUD, does the buyer pay a premium for this insurance?

A You mean is there a FHA mortgage insurance premium?

Q Yes. What is the figure on that?

A One-half of one per cent.

Q Does Carruth collect this mortgage premium?

A Yes.

Q What do you do with the premium once it is collected?

A Remit it to FHA.

Q Where is the location that it is remitted to?

A I believe it is in Washington.

Q How often is this done?

A It is done on a monthly basis, but annually [27] on each account. HUD bills us monthly, in other words, but annually per account.

Q Does Carruth require title insurance as a condition of making the mortgage?

A Yes.

Q Is this true for conventional loans as well as government insured loans?

A Yes.

Q To your knowledge, Mr. Hecker, what title insurance companies, if any, are utilized to obtain title insurance?

A You are asking me specific names — I am not prepared for this, but we have them.

Q Do you know where these firms are located?

A Not specifically, all over the United States.

Q Mr. Hecker, again, turning to mortgages on residential real property, does Carruth resell its mortgage paper to any government agencies?

A Yes.

Q What government agencies, please?

A Well, wait —

Q Or a quasi government agency?

A Yes, Fannie Mae, Gennie Mae.

Q What is Fannie Mae?

[28] A It is a quasi government organization.

Q What is it set up to do?

A Funnel mortgage support for the secondary market.

Q Where is Fannie Mae headquartered?

A Washington. We deal out of the Dallas office.

Q So, when you resell to Fannie Mae, it is to Dallas?

A Yes.

Q What about GNMA, is this the same type of operation as Fannie Mae?

A It is serviced through Fannie Mae, but Gennie Mae is a government organization.

Q Is it also designed to provide secondary aid to the secondary market?

A More of a special assistance type.

Q To whom?

A Low income type people.

Q Does it provide a lower rate of interest?

A It depends on the particular program, yes.

Q I am talking about Gennie Mae.

A It depends on the program, but generally, yes.

Q Does it provide perhaps that no down payment is to be made?

[29] A I don't believe that they have ever had no down payment.

Q Can you give the dollar volume of mortgages resold to either Gennie Mae or Fannie Mae for 1976 on residential real property?

A Offhand I couldn't.

Q Is this information readily available?

A That would be something that we would have to do some research. It would be a hand research type deal.

Q Could you give the percentage, any kind of breakdown, in terms of percentages, numbers or volume?

A We are talking about FHA or VA only, right?

Q Or conventional loans.

A Well, I would not be able to give you any of it today. It is available. It would take some research. It is not in the computer.

Q Mr. Hecker, does Carruth perform any closings?

A No.

Q None?

A None.

Q Carruth does, however, provide brokering [30] services for the mortgages?

A I don't understand the question.

MR. MC CALL:

I think I would be constrained to object to the form of the question, unless you identify more particularly what it is you mean by brokerage service.

MS. SAIK:

By brokering service, I mean bringing together a buyer and seller for the particular mortgage or mortgage paper.

THE WITNESS:

Wait — I don't understand your question. First, we do not, if you are asking do I bring a buyer and seller on real estate transactions together, no, we are not real estate agents or brokers.

EXAMINATION BY MS. SAIK:

Q I understand that. I am talking about in terms of selling mortgage money or mortgage paper. Do you broker in that area?

[31] MR. MC CALL:

Again, I would ask that that question be more precisely phrased, and the witness be informed of what you mean by, "Do you broker in that area."



MR. NELSON:

If the witness doesn't understand, he will say so.

EXAMINATION BY MS. SAIK:

Q Besides issuing mortgages to the buyer of residential real property and reselling some of that real paper in the secondary market, does Carruth perform any other financial transactions? I am talking about your business activities.

MR. O'CONNOR:

Are you speaking about residential?

MS. SAIK:

Yes.

THE WITNESS:

Like I said before, basically we originate the loan and sell it in the secondary market. That is our business.

EXAMINATION BY MS. SAIK:

[32] Q Mr. Hecker, do brokers, real estate brokers in Orleans and Jefferson Parishes ever contact employees of Carruth Mortgage in connection with obtaining financing for a prospective buyer?

A You are talking about — yes — that is our business.

Q It is a common occurrence for —

A That they come to us to make loans, yes.

Q A realtor will give you a call and say, maybe I have got a buyer, and do they bring them over to your office?

A Sometimes, not always.

Q Do realtors ever provide you, assuming you have got a buyer and they are interested in obtaining a mortgage for buying a home, and Carruth decides they are going to finance it, does Carruth ever turn to the realtor to obtain any documents or information in connection with the procedures in actually finalizing and processing this loan?

MR. O'CONNOR:

What do you mean by procedures?

MS. SAIK:

[33] Obtaining a description of property, for example, filling out of forms that are necessary for Carruth to process their loan.

THE WITNESS:

They assist in obtaining documentation for processing of the loans, certainly.

EXAMINATION BY MS. SAIK:

Q What information specifically is provided by realtors?

A I don't think — if you are asking me something that is consistent, it is not. It depends on the case.

Q Could you give us some examples?

A Surveys, descriptions of properties that you mentioned. They will expedite obtaining a termite certification, things like that. It is mainly to expedite, that type of thing.

Q Who does the loan closing for Carruth?

A The loan closings are done by independent attorneys.

Q Is Carruth ever present at the loan closing?

A No, very rarely, let's put it that way.

Q Do you have any particular attorneys or [34] companies that you refer a client to for a loan closing?

A It is rare that we refer to a specific attorney. Most people have an attorney in mind. We have in excess of, I am using a conservative figure, in excess of three hundred attorneys that are approved attorneys with us. We do not assign an attorney, per se, unless nobody else has a choice or preference.

Q Who prepares the closing statement or sheet?

A The closing statement that is used by the attorney?

MR. O'CONNOR:

Identify the word closing. The closing sheet and closing statement are two different things.

MS. SAIK:

The closing statement.

THE WITNESS:

The attorney prepares it.

EXAMINATION BY MS. SAIK:

Q Carruth would have nothing to do with the preparation of the document in connection with the closing?

[34] A We don't have an attorney on staff. That is a legal matter, no.

Q Do you receive any documents after the property has been transferred in connection with a closing, do you receive a copy of the closing sale, for example?

A Yes.

Q Is this required by government regulations?

A I don't know if it is required by government regulations. It is required by us. We have general loan closing instructions which we require all approved attorneys to follow. It gives them specifically what they have to do for us and provide for us.

Q Could we get a copy of that document, Mr. Hecker?

A Yes, sure.

MS. SAIK:

Mr. Hecker, those are all the questions I have. Some of the other counsel may have a couple of questions.

MR. O'CONNOR:

Let me ask you one or two things, [36] first, with regard to the subpoena. Other than the items which we have agreed to produce to the extent they are available, is your subpoena satisfied?

MS. SAIK:

Yes.



MR. NELSON:

Yes, as of now, yes.

EXAMINATION BY MR. MC CALL:

Q With reference to your testimony about communications to real estate agents, which I understood were flyers or letters or cards of some sort, are these in the nature of advertisements as to the availability of your services?

A Yes, availability of funds and prices.

Q Would it be fair to describe the business of Carruth as that of lending loans on real estate?

A That is correct.

Q To whom are those loans made?

A To the purchaser or borrower of the real estate.

Q That is to say the owner or prospective owner?

[37] A Correct.

Q Do you conceive the services of a real estate agent to be to bring the purchaser and seller together?

A Yes.

Q Are these services in any way an integral part of your lending?

A No.

Q You made reference to the fact that occasionally real estate agents would bring people over to Carruth?

A Yes.

Q Is this an essential for Carruth to make these loans?

A For the agent to accompany them?

Q Yes.

A No. In fact, I think most of them aren't accompanied by real estate agents, at that time.

MR. MC CALL:

Thank you. I believe those are all the questions I have.

EXAMINATION BY MR. VAUDRY:

Q The flyers, as Mr. McCall referred to, in your mail out of rate quotes, is that [38] not mailed exclusively to realtors?

A No, to any possible sources of business, developers, builders and so forth.

EXAMINATION BY MR. NELSON:

Q Mr. Hecker, the flyers that are mailed, the purpose of mailing of these flyers is to encourage people to send prospective borrowers to you, is that correct?

A Correct.

Q When these are mailed to realty companies and real estate agents and brokers, it is hoped that that would encourage them to send prospective buyers to your company?

A That is the purpose.

Q Are any of these flyers, these mailings, are they sent to the general public, to occupant of a particular house?

A No.

Q So, as far as you are concerned, you expect that your business will come through, among others, but some of the people to which these flyers are sent?

A The vast majority of our business is [39] originated through this.

Q Now, when you said, testified that occasionally

real estate agents accompany people, would you have any idea as to how often real estate agents are involved in setting up the appointment?

A No, I would not. The appointments are set up primarily with the girls. If they come in and set up an appointment, I don't know.

Q Is Carruth Mortgage Company involved in any organizations in which real estate agents are also members, realty companies?

A You are talking about the Real Estate Board and things like that?

Q Yes. You are a member of the Real Estate Board?

A I think we are a member of a different number of trade organizations, as to the specifics, I don't know.

Q Are real estate agents members of the same organizations that Carruth is a member of?

A Yes, I would have to say I believe we are. [40] I would have to find out. I'm not sure.

Q I would like to get that information, and the purpose of these meetings.

MR. O'CONNOR:

What meetings?

MR. NELSON:

What is the purpose of those organizations.

MR. O'CONNOR:

If you can name a particular one.

MR. NELSON:

He knows what organizations he is a member of.

THE WITNESS:

I don't know. I'm not sure. I believe we are, and that is what I am saying.

EXAMINATION BY MR. NELSON:

Q You don't know the function of the New Orleans Real Estate Board?

A We would not be an active member as such. We go primarily the same as we go — a matter of trying to generate business, meet people, shake hands and not be active in its programs as such.

[41] Q How long have you been with Carruth Mortgage?

A Fourteen years.

Q What were you before you were president?

A From the beginning, I started out as a clerk, assistant, vice president, executive vice president, president

MR. NELSON:

I have no further questions.

MR. O'CONNOR:

You are looking for summary reports showing residential volume from the Orleans and Jefferson branch offices for such years as they are available?

MR. NELSON:

The number of loans.



MR. O'CONNOR:

Whatever the summary reports show.

MR. NELSON:

I am interested in the number of loans and volume. If all you can give is a summary report —

MR. O'CONNOR:

He has stated the summary report shows that.

MR. NELSON:

[42] I am interested in the number of loans and volume.

MR. O'CONNOR:

To the extent that that is available on the summary report.

MR. NELSON:

I am not conceding that I am going to stop there.

MR. O'CONNOR:

If you are not happy with the summary report, then we can start there.

MR. NELSON:

My understanding, as far as I am concerned, I want certain information now, and if you tell me I can't get it, we are going to have to pick up from there.

MR. O'CONNOR:

Mr. Hecker has stated that to his knowledge the information that you are speaking about is disclosed in

the summary report, the hand records that are kept by the various branch offices.

MR. NELSON:

I don't care what they call it.

[43] MR. O'CONNOR:

Let's get it understood, we have agreed to get the summary reports, make copies and make them available to you.

MR. NELSON:

Counsel, we are not listening to each other. I want the number of loans made by the branches and total volume of money. If it comes on the summary report, I will take it. I don't care how it comes to me, but I am not agreeing if the summary report doesn't give me what I want that I will stop there.

MR. MC CALL:

Skip has said he will produce these records, and if they don't have the information that you want, you are not stopped. He is telling you that.

MR. O'CONNOR:

If you are not satisfied, I will do what I reasonably can to satisfy you. I am not committing myself to making a manual search for the records, if that is what is necessary to satisfy [44] you.

MR. NELSON:

I am not agreeing to that. I just want the information now. It is up to you what kind of search you want to make.

MR. O'CONNOR:

Not entirely up to me.

MR. NELSON:

Well, Mr. Hecker.

MR. O'CONNOR:

We would voluntarily submit to you all readily available information, namely, the summary report. If you are not satisfied, you are not stopped, and you may pursue further discovery. We think from his testimony that we have satisfied the specific questions you have. If it doesn't satisfy you, tell me what the reason is, and if we can satisfy you readily, we will do it. We are not saying you are stopped to go any further.

MR. MC CALL:

You are saying you are not committed [45] to give the ultimate information he may want, because —

MR. O'CONNOR:

This also applies to FHA and VA loans?

MR. NELSON:

And number of trade organizations he's a member of.

MR. O'CONNOR:

Okay.

MR. NELSON:

The loan closing procedure, and that is about it.

MR. VAUDRY:

With respect, Mr. Hecker, to the initial disbursement of funds, in connection with the closing of loans, is the dispersal at all times of Carruth Mortgage's own funds?

THE WITNESS:

We close a loan in Carruth Mortgage Company's name, and we disperse the loan, and it is warehoused sometime later, depending on a day, whenever we need the funds.

\* \* \* \*



CARRUTH MORTGAGE CORPORATION  
LOAN PRODUCTION — ORLEANS AND JEFFERSON PARISH BRANCHES

	FHA		VA		CONVENTIONAL		TOTAL	
	NO.	AMOUNT	NO.	AMOUNT	NO.	AMOUNT	NO.	AMOUNT
1971	453	\$9,264,675	409	\$10,382,150	113	\$3,762,527	975	\$23,409,352
1972	223	4,962,500	565	14,828,895	214	7,169,455	1,002	26,960,850
1973	57	1,151,050	425	11,056,325	145	4,072,050	627	16,279,425
1974	135	2,753,150	490	14,071,875	136	4,253,500	761	21,078,525
1975	333	7,621,400	582	17,454,075	228	8,078,000	1,143	33,153,475
1976	318	7,566,000	565	18,547,950	118	4,438,700	1,001	30,552,650
	1519	\$33,318,775	3036	86,341,270	954	31,774,232	5509	\$151,434,277

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[459] UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Mar. 29, 1977

Deposition of JAMES W. MILLS, JR., taken in the office of Messrs. Nelson, Nelson & Lombard, Suite 1100, 344 Camp Street, New Orleans, Louisiana, on Thursday, January 6, 1977.

APPEARANCES: (Omitted)

\* \* \* \*

[4] EXAMINATION BY MS. SAIK:

Q Mr. Mills, what type of work do you do?

A I am President of Lawyer's Title Insurance Corporation, a franchised agent of Richmond, Virginia.

Q Do you insure policies of title insurance for residential real property in Orleans and Jefferson Parishes?

A Yes, we do.

Q Does the company that you deal with here in Louisiana actually insure the property, or is this done by your parent — or you mentioned you were a franchisee of a company in Virginia?

A Richmond, Virginia, right. The national company, Lawyer's Title Insurance Corporation is actually the underwriter and insurer. We issue the policies as their agent.

Q What service does your company provide, Mr. Mills?

A We are what is known as a full line title insurance company. We do abstract work, title certification, underwriting of outside attorney opinions, as well [5] as closing the deed and mortgage transactions.

Q Does your company use any public records to compile the data which your company is concerned with?

A We have the only title plan in the city. By this I mean, we take the public records which are normally in name sequence and put these into a computer and rearrange them in property sequence. To do this, we take data from the Conveyance Office Books in Orleans Parish and from a film of the complete documents in Jefferson Parish.

Q Do you use any other records that might be available?

A In the preparation of the title work?

Q Yes.

A Offhand, I can't think of any.

Q Now, you mentioned you participate at closings. Who is usually present at the closings, Mr. Mills?

A The closing attorney, the buyer, the seller and their real estate agents.

Q Is it, or is it not a common practice for [6] real estate brokers or agents to be present at closings, in your experience?

A In my experience, I would say that is the usual situation.

Q Can you give a rough estimate of the volume of insurance policies that your company has issued for say

1975, talking about now in terms of the total value of property insured?

A 1975, it would be approximately two hundred million.

MR. VAUDRY:

You are talking about Louisiana properties?

THE WITNESS:

I am talking about Orleans and Jefferson. Generally, let me correct that, generally the nine river parishes as we call them, Orleans, Jefferson, St. Bernard, St. Tammany, Plaquemines, St. John — I missed a couple.

EXAMINATION BY MS. SAIK:

Q Can that be characterized as the Greater New Orleans Area, plus a little more?

A Yes, the metro plus.

[7] Q Is that figure you just gave comparable for the years say from 1971 through 1975, give or take a little?

A I honestly don't have the figures handy that far back. 1974 would be a considerably higher figure, because of one policy that we wrote for two hundred and seventy-five million dollars. So, that would start the picture.

Q Was that residential?

A No, I am sorry —

Q What publications are you aware of that are available on real estate and real estate transactions? I am speaking now of Orleans and Jefferson Parishes and the Greater New Orleans Area.



A There is a daily record newspaper which lists the transactions, the Sunday newspaper, the Times Picayune, which lists the transactions, and, then, there is a company called Deedfax, D-E-E-D-F-A-X, which publishes these records, arranged in streets sequence and subdivision sequence. Up until a couple of years ago, we published a [8] summary document.

Q What was the name of that document?

A Ours was called Comptran, C-O-M-P-T-R-A-N, for computerized real estate transfers.

Q What information did that contain, Sir?

A We published it monthly, first arranged by street, and it showed for a particular street the transactions, the municipal number, the district square and lot, the purchaser, entry number, type of transaction and the dollar amount of the sale.

Q Has your company ever published any document statistics concerning the volume of mortgage activity in the Greater New Orleans Area?

A For about three years we published two records, one called Mortgage Report, which consisted of a summary page of the major lenders in the metro area, the number of loans and dollar volume of the loans, and on separate pages, the individual loan, the borrower, the interest rate, the term, the property, and possibly some other information.

[9] Q You may have stated this already, Mr. Mills, but what period is that you are speaking of that these were published?

A Approximately August of '71 through July of '74.

Q Are any of those publications presently avail-

able? I am speaking of the one published in those years, are they presently available, at this time?

A Perhaps six or eight issues.

Q Do you have any in your possession?

A I had this cover sheet from the months that I had, which simply lists — it is a summary that I mentioned of what happened in the particular month. The first page, for example, is the month of July of '74, and it shows the total loans, and it breaks it down by home-  
stead, individual and mortgage companies.

Now, I am sure these are available in various locations. We had a rather extensive customer list, obviously not extensive enough, or we would be still publishing.

Q This was filed in connection with your company [10] offering a —

A To anybody who had \$25.00 a month.

Q Who were your customers?

A Generally the lending institutions and developers. Actually, it was a very good publication, and it did give the details. These papers are only the summaries. There are many people who would like to see it reinstituted.

Q I would like to mark this for identification as Mills No. 1.

Mr. Mills, let's get back into this document here a minute. You have here on the left hand column, the name of the lender, and then, the column entitled the summary of mortgage activity and FHA and VA and conventional and the total, all loans, and where was this information obtained?

A From the records that went into my title plan for that month, for every deed that IBM card is punched. For every mortgage an IBM card is punched. I used to create an index for my title work by arranging them. You can get a [11] document like that.

Q This document does not contain the geographical region which this mortgage activity is pertaining to, could you tell us?

A Orleans, Jefferson, St. Bernard and St. Tammany.

Q Mr. Mills, this particular page does not have a date on it. Could you look at it and perhaps tell us what that refers to?

A I really couldn't.

Q Do you have the original booklet of these particular ones?

A Yes, this is the first page of each one of the reports.

Q The rest of the reports, you stated, I believe, contained information on each particular lender?

A Yes, the details of it.

Q You stated that you often performed closings, real estate closings, and what type of closing forms, if any, do you use?

A Are you talking about the deed or the mortgage or the closing statement?

[12] Q The closing statement.

A The closing statement is a national standard, HUD statement, that was, came out along with the Real Estate Settlement Procedures Act of 1974.

Q The Real Estate Settlement Procedures Act, in

other words, it sets out the requirements for what must go on to a closing statement?

A Correct. Now, in addition, some of the lenders require some extra items, but the basic statement is nation wide.

Q Basically, what information is available on those closing statements?

A Of course, you have a statement for the seller and a statement for the purchaser. It has a total amount of the transaction, the various expenditures that we have made on behalf of the purchaser or the seller, and the seller might pay discount points, the cost of the certificate, the vendor's closing fee. The purchaser would be paying for a wide range of items, for example, credit report, surveys, title insurance —

[13] Q Is the real estate commission shown on those forms?

A The real estate commission is shown on those forms.

Q From whom do you determine what a real estate commission is, does a buyer or seller tell you or the real estate agent —

MR. VAUDRY:

Are you referring to —

MS. SAIK:

I am referring to the question on the closing statement that tells —



MR. VAUDRY:

In the instance where a commission is paid?

THE WITNESS:

Would you mind repeating the question?

EXAMINATION BY MS. SAIK:

Q Say we are at a closing, and you have got the closing statement prepared. From whom do you determine, assuming there was a commission paid, from whom did you determine what commission was paid?

MR. BARBERA:

[14] You mean how much is the amount of the commission?

MS. SAIK:

Right, actually.

MR. BARBERA:

How do you know what is the amount of the commission so you can put it on the closing statement?

MS. SAIK:

Yes.

THE WITNESS:

I am embarrassed to say, I don't know the answer on that.

(Off the record)

THE WITNESS:

My answer would be my opinion, that you would look at the —

MS. SAIK:

That is all right.

EXAMINATION BY MS. SAIK:

Q Isn't it a fact, Mr. Mills, that on occasions, in most instances, the rate of real estate commission is determined from the purchase agreement?

A Yes.

[15] Q Getting to the title insurance service you offer, Sir, how is the premium on these insurance policies collected, generally, in most instances?

A Generally —

Q What I am getting at, really, who does the money come from, who does it go to?

A The money comes generally from the mortgage company on behalf of the borrower. We collect the total fee, and then, then monthly I submit the premium to the home office of our underwriter, Lawyer's Title.

Q Which is located in Virginia?

A Richmond, Virginia.

Q Have you ever contacted any brokers or realtors in Orleans and Jefferson in connection with the services you provide in terms of giving information, national data concerning how title insurance works?

A Over the years, I have probably spoken to most real estate offices, trying to promote the use of title insurance.

Q Do you have available any brochures or pamphlets describing your services?

[16] A I would have fifteen or twenty different items.

Q Have those been distributed to realtors or brokers in Orleans and Jefferson Parishes?

A I would say the majority of the real estate branch offices.

Q What industrial organizations does your company belong to?

A The American Land Title Association, the Louisiana Land Title Association, the Mortgage Bankers Association, the FH Home Builders Association.

Q Are these all national organizations?

A They have both, generally both a state or local operation and a national.

Q To your knowledge, Sir, do any realtors or brokers belong to any of these associations?

A I really don't know. I am sorry.

Q How many title insurance companies service the Orleans and Jefferson Parish area, Mr. Mills?

A There are approximately twenty-seven underwriting companies. The total number of agents in this area, I [17] honestly don't know the total.

Q Do you know whether or not these companies are headquartered in Louisiana?

A To my knowledge, there has only been one company that is headquartered in Louisiana, and I don't believe they are operating at the moment.

Q Is it your testimony, Sir, there are approximate-

ly twenty-five underwriting companies who provide title insurance services, and these would be companies located out of Louisiana?

A That is correct.

Q Does your title insurance company do business with any out of state companies in connection with providing real estate insurance?

A I will have to get you to repeat that one.

Q Does your company do business, or has it written any title insurance policies for companies that are headquartered out of Louisiana or out of the state?

A You mean Lawyer's Title of Louisiana?

MR. VAUDRY:

You are restricting your question [18] to residential?

MS. SAIK:

Generally, and if we can, if you could state yes or no, and if the answer is yes, please designate whether or not it is commercial or residential.

THE WITNESS:

Well, the answer is yes, and the second answer would be both.

EXAMINATION BY MS. SAIK:

Q What types of financial organizations use the title insurance service of your company?

A All FHA/VA loans. In fact, most loans that are insured or have anything to do with government agencies would be covered by title insurance. Generally, a



mortgage company transaction would be covered by title insurance.

Q Mr. Mills, have you ever been approached by any organizations composed of real estate agents interested in obtaining information about your services in terms of having you come address a group of realtors or brokers?

[19] A Most of the time would be my contacting them.

MS. SAIK:

I think that is all I have, Mr. Mills. These gentlemen may have some questions.

(Off the record)

EXAMINATION BY MR. VAUDRY:

Q Mr. Mills, in your testimony given earlier, you indicated that, and I believe you were giving a best guess, that in 1975, the value of the property in the nine river parish area that you have contacted with the value of the property issued through your agency was roughly two hundred million dollars, is that a fair statement of what you said?

A That is correct.

Q Now, does that figure relate both to commercial and residential properties?

A That would be both.

Q Do you have a breakdown as to what is — and by residential, I mean one to four family dwellings.

A I can not break it down, at this time.

Q Also, is that two hundred million dollar [20] figure the actual value of the pieces of real estate as opposed to the amount of insurance issued in 1975?

A Generally the answer would be both.

Q Well, you don't insure in a mortgagee's policy, for example, you don't write the insurance for the full value of the property, necessarily?

A No, in that case, it would be somewhat higher.

Q The value would be higher than the insurance?

A Right.

Q What is the two hundred million dollar figure, the value of the property or the insurance?

A It would be a mixture. I compile it based on what my approximate service cost is for a million dollars worth of title insurance.

Q This is based on your expenses?

A No, based on my premium, and I know approximately what my premium was, and I simply multiply that times the one million to come up with that. If I gave you figures of the premium, you could determine my gross insurance, [21] take for 1975.

Q Except that, isn't it a fact that that is a sliding scale?

A I have tested this average figure typically, and in the past, it has cost one per cent for a \$50,000.00 policy, whether it was mortgage or owner — if you take an average figure of approximately two fifty-five, it gives you a pretty good scale for what my business average is, the premium.

Q So, this is based upon the calculations of the input at, as you said, and not based on the actual data of going back and looking through?

A Yes.

EXAMINATION BY MS. SAIK:

Q How long have you been in the title insurance business, Mr. Mills?

A Ten and a half years, long years.

MS. SAIK:

Thank you very much, Mr. Mills. You have been very helpful.

\* \* \* \*

[460] UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Mar. 29, 1977

Deposition of MEAHER P. TURNER, taken in the office of Messrs. Nelson, Nelson & Lombard, Suite 1100, 344 Camp Street, New Orleans, Louisiana, on Monday, January 3, 1977.

APPEARANCES: (Omitted)

\* \* \* \*

[4] MR. NELSON:

This is the discovery deposition, and we are starting at 2:45 P.M., and one or more lawyers have not shown up, and there is no objection on the part of anybody present to start.

EXAMINATION BY MS. SAIK:

Q Mr. Turner, you were asked to bring with you today any documents that you might have describing the services and programs of the Department of Housing and Urban Development, in connection with residential real property.

Could you explain what documents you brought and give a brief description of each?

A All right, I have here the programs that are administered by HUD, all programs I have here, single dwelling programs, multi family programs and community block programs, and this is as of December 1976. So, it is pretty current. It gives a brief summary of each of the programs. It doesn't go into any great details of any one program. It does give a synopsis of [5] each program.

Q I am going to mark this for identification, Turner No. 1.

A I also have this exhibit here called the Fact Sheet, and it is on the 203 (b) Home Mortgage Insurance Program. Section 203 (b) of the National Housing Act provides a program of mortgage insurance to assist home buyers in the purchase of new and existing one to four family dwellings. It is the basic and most commonly used HUD/FHA program. Properties must meet all applicable standards of HUD/FHA's Minimum Property Standards, but there are no special qualifications for borrowers.

Q I will mark this for identification as Turner No. 2.

A That speaks of the 221 (d) (2), as well as the 203 (b) program.



I have here a handbook on the original 235 (i) program, as it was originally. There have been many changes in the new program. The new program was re-activated last year, in January of '76. [6] This is the original program, and I have here a little dissertation on the revised program as it is now.

Q On the 235 (i)?

A Yes.

Q I will mark these for identification as Turner No. 3.

A That goes with this. (Indicating)

Q And also Turner No. 3A.

A I also brought with me the FHA Home Regulations for home mortgage insurance. If there is any need for research in the regulations, we have the resources here to go into specific questions.

Q Would you state your full name for the record, please?

A Meaher Patrick Turner.

Q By whom are you presently employed, Mr. Turner?

A The Department of Housing and Urban Development, the New Orleans area office.

Q What is that address, Sir?

A 1001 Howard Avenue, New Orleans, 70113.

Q What is your job position with the Department of Housing and Urban Development?

[7] A I am a deputy director for the Housing Department on mortgage credit.

A In that position, Sir, what are your job duties?

A Supervisory capacity with a technical under-

writing branch, the cost branch, the evaluation branch, architectural branch and mortgage credit branch.

Q What is the geographic jurisdiction of the HUD office in New Orleans?

A Roughly the southern half of Louisiana, from the Mississippi border to the Texas border, if you draw a straight line across the Florida Parishes to the Texas border.

Q Does that jurisdiction include Orleans and Jefferson Parishes?

A Yes, it does.

Q Are you familiar with the programs available for HUD/FHA home insurance of residential real property?

A Yes.

Q Could you identify the HUD/FHA programs that finance or insure one to four family residential units in Orleans and [8] Jefferson Parishes?

A I can identify the insurance programs. We have no direct loans for home ownership.

Q Would you just basically explain what you mean by insurance program?

A We will insure loans on real estate on single family to four family units, and we will insure the lenders against loss in the event of a loss.

Q In connection with that purpose, could you identify, by name, the programs that are available for this purpose?

A Yes, 203 (b), Section 203 (b) of the National Housing Act, the basic program for which all other home ownership programs are a take off of, and

basically, they consist of a maximum loan of \$45,000.00 on a single family residence, and I have the loan amounts here. I will refer to them — \$45,000.00 on a single family home.

Q You are referring, Sir, to Turner No. 2?

A Yes, \$48,750.00 for a two family or duplex, a triplex or three family home, \$48,750.00, and a four plex or four [9] family home, \$56,000.00. The maximum term is thirty years. And, of course, we make available to the buyers a relatively low down payment than they would ordinarily get if they went to a conventional source.

Q In other words, a home buyer might obtain more favorable financing from FHA as opposed to conventional financing?

A Yes.

Q In what respect?

A With respect to interest rate and mortgage term, possibly. There are some lenders that lend on a thirty year basis, but not all conventional sources do.

Q In addition to the program that you just identified, the 203 (b), could you name any other FHA or HUD programs that insure residential real property in Orleans and Jefferson?

A The 221 (d) (2) program, similar to the 203 (b) program. It is tailored for the low to moderate income families and has a mortgage limitation lower than the \$45,000.00, and it has a down [10] payment requirement that is somewhat less than the 203 (b).

Q Mr. Turner, you brought a document which has been marked for identification as Turner No. 3, en-

titled Section 235 (i). Could you address yourself to the procedures of that program?

A It has the same mortgage limitations as the 221 (d) (2) program. The difference is that the 235 (i) program is a subsidized program. The loans are made at the market interest rate by the lender, and the government subsidizes the interest rate to a point where the borrowers pay on the equivalent of a five per cent mortgage. This becomes a below market rate interest loan in favor of the purchaser, and allows the lower income families to buy into home ownership they wouldn't ordinarily be qualified to do under the regular down payment requirements and monthly mortgage payments at the market rate interest.

Q Are the monies in this subsidized program paid directly to the buyer, namely the [11] 235?

A No, it is not.

Q Who receives this money?

A The lender, the mortgagee.

Now, the new program is — the 235 program was re-activated in January. At the moment, there are no new loans under this program. It is inactive. The program has been inactive since January. There are no new 235 mortgage transactions.

Q When was this program in full force and effect, the 235 (i)?

A I think it starts in '69, and a moratorium was declared in January of 1970. I think '70, yes.

Q After January of 1970, there were no new insuring under this particular program?

A There was no new cases processed. There was



some secretary held properties that were resold with benefits.

Q Other than those instances, from January of '70 to what date was this program inactive?

A Up till, well, January '70 to January of last [12] year, '76.

Now, there were loans made directly by secretary. There were allocations made on the real estate of property commissions or secretary held properties. These properties were defaulted and resold by the secretary with benefits.

Q Are there any other mortgage programs?

A Yes, the Section 222 program, in service servicemen, servicemen in service, a program whereby a person in the service, a sailor, soldier, marine, whatever, can get a loan through the 222 program, even though he may be only temporarily stationed, you know, within the confines of the city where he is purchasing. He need get from his commanding officer a certificate of need, which says, in effect, that he has need for the house at his new location. And, with this, we will insure the loan. We do not ordinarily accept the risk under the 203 (b) for servicemen, because of their employment that gets them around the country, [13] transferring here and there.

Q Mr. Turner, does a home buyer, who obtains the mortgage, pay any sort of premium for the benefit of FHA/HUD insurance?

A Yes. The home buyer pays each month, one-twelfth of the annual premium. The premium itself is one-half of one per cent of the mortgage amount.

Q To whom does the home buyer pay this premium?

A When he makes his debt service payment to the lender, it is included in the debt service payment to the lender.

Q How does the Department of Housing and Urban Development receive these monies?

A That is a transaction between the lender and the HUD Washington, central office, in Washington. The bookkeeping there is done at the central office level. We don't get into that locally.

Q In other words, the lender authorized the amount representing the insurance premium to the Washington office of HUD?

A That is correct.

Q Is this done monthly?

[14] A Yes.

Q Is this premium a condition of all the programs you described previously?

A All except the 222 program, in service loan. The premium is waived until such time as the in service person is discharged. At that time, if he still retains the home, he starts paying the mortgage insurance premium.

Q What happens to the monies once they are received by the HUD office in Washington?

A Well, it is kept in a reserve account for the contingencies that occur when a mortgage is defaulted. The lender is paid off from the fund. HUD takes the home back and repairs it and puts it back on the market for resale.

Q Who is eligible for HUD/FHA financing, Mr. Turner?

A Anybody that would qualify on income and ability to go to a loan closing. It need not be a citizen. They would have to qualify on certain characteristics and income.

[15] Q Suppose a home buyer wants to secure FHA/HUD financing, what process would that home buyer go through in order to secure this?

A I think your question assumes there is a house for sale, either by the owner or realtor, acting for the owner, and he would go through either one, as the case might warrant, and if it turns out it was to be an FHA transaction, the home owner or realtor would go to the mortgage lender, approved HUD mortgage lender, approved HUD/FHA mortgage lender. The mortgage lender would order an appraisal. We are assuming, again, that this is an existing house that is offered for sale. They would pay a \$50.00 fee for appraisal.

Q The buyer would pay this \$50.00 fee for appraisal?

A Eventually he would pay, yse.

Q The mortgage lender must contact you, the HUD office?

A The mortgage lender files an FHA 2800 form for appraisal and conditional commitment.

Q Can a buyer go directly to HUD to obtain the [16] necessary arrangements?

A No, he must go through an FHA approved mortgagee.

Q Is it necessary to be approved by HUD in order for a mortgagee to request financing for a buyer?

A Right, yes.

The list of these mortgagees can be obtained from the local office.

Q Do realtors or brokers ever contact the Department of Housing and Urban Development office in order to secure a list of the approved mortgagees?

A It is possible, I suppose. We have, in the past, received such requests, and consider it forthcoming, and we will mail them one upon request, a list of the approved mortgagees.

Q You do have a list available for this purpose?

A Yes, to the general public or whoever is interested in knowing who the approved lenders are.

Q I believe we reached the point where the buyer goes to the lender in order to [17] secure HUD financing. At this point, what occurs then?

A We are obligated within five days to make an appraisal and issue what we call a conditional commitment. Now, the conditional commitment will give the appraised value of the house and the amount of the money we will insure on a qualified applicant, and also obtain possibly other conditions, maybe repair conditions, some repairs that may be required. The commitment will be predicated on these repairs being made prior to endorsement by HUD for insurance. Having gotten the appraisal and loan amount, we will insure. The next step would be the borrower's application, again, through the mortgage company.

Q What documents must be submitted by the financing company or mortgage company to HUD in order to obtain insurance?



A All right, there will always be a copy of a purchase agreement. Now, if the conditional commitment was issued prior [18] to the date on the purchase agreement, the purchase agreement need not contain amendatory language. If the purchase agreement was signed prior to the issuance of a conditional commitment, then, the purchase agreement must include the amendatory language, which says, in fact, that the FHA appraisal does not come up to a certain dollar amount. Then, the purchaser has the option of backing out of the transaction without any penalty.

Q What other documents other than the purchase agreement are submitted?

A The mortgagee will order a credit report on the borrower. He would have gone to the various sources and gotten various figures of the employment on the borrower and go to all the depositories and verify funds on deposit and determine whether or not the data given in the application was factual. And, if the buyer has enough money to go to the loan closing, and, of course, the application itself which contains all pertinent [19] information as to the amount requested and the mortgage monthly payments, the principal and interest payments, the mortgage insurance premium amount, the estimated one-twelfth of the annual taxes, the estimated one-twelfth of the hazard insurance. There is also an amount put in there for estimate for maintenance over the years, based, again, on one-twelfth of the annual estimate, and also, the utility estimate, the utility bill estimate. It will show then the total housing expenses to include all of these items, and it

will also show the monthly recurring charges that this borrower has now recurring. It is considered to be a recurring charge, where the monthly obligation is going to be longer than a twelve month period. For instance, if he has a car payment to make, it is going to exceed twelve months. He must show that as a reoccurring charge, and it is considered when they make an analysis as effects of [20] income being adequate to support the total housing expenses, plus the living expenses. So, any obligations that the borrower has that is going to run in excess of twelve months must be considered as recurrent, his life insurance premium and car payment, if they run in excess of twelve months, and all department store accounts that run over twelve months. In addition to that, it shows that he is employed by such and such a company, that he has x number of dollars, a financial statement, included in there as assets in this bank and that bank, as well as liability. It is a complete wrap up of this particular person's situation, financial situation, and, of course, he will sign that under penalty.

Q Will HUD give an appraisal without a buyer having been located?

A Yes, right. Again, that is a \$50.00 fee for an appraisal and conditional commitment. They need not be a buyer involved at the time the request is made for an [21] appraisal.

Q Which transaction would be most common, where HUD gives an appraisal to the seller, or where a buyer has already been located or is interested —

A The usual procedure is to get the conditional commitment beforehand.

Q Before a buyer is located?

A Before we know about a borrower. They may or may not have a borrower in mind, but ninety-nine out of a hundred, they will come in for a conditional, regardless of whether they have a buyer or not. I am speaking in terms of issuing a conditional commitment prior to issuing a firm commitment for the buyer, as opposed to doing it simultaneously. We very rarely get a joint application for buyer and — the sequence is to get the conditional commitment and come in with the buyer. The conditional commitment is good for six months. It permits you to get the house on the market, then get a buyer. You have a six month time period to get [22] a buyer. That is an existing house.

In the case of a proposed construction, who would have gotten the house plans and specifications along with the conditional commitment and cost of plans and arrived at a value prior to completion.

Q Mr. Turner, for what purpose would a seller obtain a FHA appraisal?

A For what purpose would he obtain a FHA appraisal? Well, I guess for obvious purposes of selling a house to a client. It is a financing resource, I suppose, that is available only to certain borrowers that may not qualify under the conventional type of mortgage procedures. The FHA would offer a lesser down payment, the program would, and it would possibly afford the borrower a longer term, thereby, making his monthly payments lesser than would be on a twenty-five year term that a conventional lender would insist on. It is just another way of selling a house, I suppose, and you

need not follow through on the conditional [23] commitment. You may just be shopping for an appraisal and may eventually sell it through a conventional lender.

Q Does HUD require title insurance as a condition for selling a property?

A Yes.

Q Would this be true under all the programs you mentioned?

A Yes.

Q Do you have any knowledge of how the title insurance is obtained?

A No, except a qualified title company. I don't know anything about that. I would have to do some research. But, it will come from a title company, naturally.

Q If a person defaults on their mortgage obligations, where HUD has insured the mortgage, what obligation does HUD have at that point?

A Well, we won't consider any default until it becomes three months delinquent, three consecutive months that the borrower misses a payment. At that time, the mortgagee has a option of [24] notifying HUD of the default, and we then can negotiate as to whether or not we will take a deed in lieu of foreclosure, or whether or not we will go to foreclosure. We try to work out an agreement. It is my understanding that HUD will try to work out an agreement with the borrower. Before they do anything drastic, they will take a deed rather than go to a foreclosure. If more information is needed on that, I suggest you call the Housing Management Division at HUD.

Q Who is in charge of that division, Sir?



A Mr. Herman Duncan.

Q If a buyer does default on their mortgage, will HUD then pick up an obligation on that mortgage to pay the remainder of the obligation to the original lender?

A Yes, that is the purpose of the mortgage insurance premium.

Q Are those monies paid from the New Orleans office?

A No, that is handled directly with the HUD [25] Washington office.

Q So, the monies will be paid from Washington to the original lender?

A Right.

Q Are HUD properties ever sold or resold in the housing market following a repossession?

A Yes, at the repossession, yes, HUD will take it over and do any necessary repairs that have to be done and put it back on the market. They will advertise it through, again, an approved broker. They have a list of people who have qualified themselves as brokers to handle the secretary held properties. Again, you can get a list from Mr. Duncan.

Q To your knowledge, has the HUD Area Office ever sold properties within Orleans and Jefferson Parishes through the approved real estate brokers that you just mentioned?

A Yes.

Q Is that common practice?

A Yes.

[26] Q Are the brokers who handle those sales paid a commission?

A Yes.

Q Assuming the property is sold?

A Yes, they are paid a commission.

Q To your knowledge, Mr. Turner, are the mortgages which your department insures ever sold to other financial institutions either in Louisiana or outside of Louisiana?

A If I understand your question, yes. For instance, many, many of the mortgage companies will handle their paper through the Gennie Mae Agency.

Q Could you explain what Gennie Mae is?

A The Government National Mortgage Association. At times, congress will appropriate below market interest rate money to buy those mortgages, and, of course, the mortgagees or local mortgagees will take advantage of that and offer their clients a reduced interest rate through the Gennie Mae outlet. And, whereas they take the application here and submit [27] it to us, they will then market the loan to Gennie Mae, or it could be an insurance company or just anybody who wanted to warehouse the loan. This is where you have the discount points come into effect, the people who warehouse these loans, because they can invest their money elsewhere at a higher interest rate. They will demand a discount and not take the loan at the partial discount, maybe two to three points. Depending on the money market, in general, the discount points fluctuate.

Q Is HUD notified by the original lender if the mortgage is then resold?

A The local office, no. We never an idea of that.

Q Who would be notified, if you know?

A Central office would have to know eventually who was servicing the loan.

Q By central office, you mean —

A Washington.

MS. SAIK:

Mr. Turner, those are all the [28] questions I have. The other counsel may have some questions to ask you.

(Off the record)

MR. MC CALL:

Mr. Turner, it is our considered opinion that you have been so informative on this matter that we have concluded that we will waive cross examination. Thank you very much.

\* \* \*

(Exhibits Omitted)

[461] UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Mar. 29, 1977

Deposition of MAX DERBES, JR., taken in the office  
of Messrs. Nelson, Nelson & Lombard, Suite 1100, 334

Camp Street, New Orleans, Louisiana, on Wednesday,  
January 12, 1977.

APPEARANCES: (Omitted)

EXAMINATION BY MR. NELSON:

\* \* \*

[12] Q And who is eligible to be a member of Realatron?

A As far as I know, everybody is eligible.

Q Everybody in the real estate business?

A Yes, sir, they have some who aren't in the real estate business.

Q Are you a member of Realatron?

A No, sir.

Q Is your company a member?

A No, sir.

Q To your knowledge, is anybody on the Board a member of Realatron?

A Yes, sir. I don't know precisely which ones that are members.

Q How would you know they are members of Realatron on the Board, how would that information have come to you?

A Well, they keep the terminal in the Board office, and their members have told me they are members.

Q What terminals are kept in the Board office?

A Well, they have a computer terminal wherein the information comes out on Realatron and goes in.



[13] Q Who pays for the upkeep of the terminal?

A The Realatron group.

Q Does the Board participate in any way in the upkeep of it?

A Well, not currently, no, sir.

Q Did it ever?

A Yes, sir. I think that we assisted years ago, but I can't recall how many, in getting it going, because it was a loss at first.

Q Is it making money now?

A I think it is breaking even, I'm not sure. I don't know anything about it.

Q For what reason would the terminal for Realatron be in the Board office?

A Well, we consider this a good thing for realtors.

Q And through Realatron, realtors can determine the availability of homes in states other than the state of Louisiana, is that correct?

A No, sir, I don't believe they can. You see, it works on a geographical pattern, and if you belong to New Orleans, you get the New Orleans information. If you [14] belong to Jefferson, you get the Jefferson information.

Q What information do you get from Realatron that is located in Orleans Parish, in the Board office?

A You get those properties which the members of Realatron have listed, no others.

Q Does the Board keep — who keeps, who is in charge of the taking care of this terminal and operating the terminal?

A The Realatron group.

Q And this is done in the Board office?

A Yes, sir.

Q Is there anyone there that collects the information from the terminal?

A They have a part time gal, I believe, I don't know what their status is now. They have over the years had a part time gal there.

Q Is she still there?

A I think so.

Q It is your testimony that the Board has nothing to do with the terminal, is that your testimony?

A That is correct.

[15] Q Does the Board ever use the information that is gotten off of the terminal?

A No, sir.

Q Have you ever seen the information that comes off the terminal or are you aware of what comes off?

A Yes, sir.

Q Have you ever heard of a quarterly statistical report?

A Yes, sir.

Q Is that one of the publications produced as information from Realatron?

A I think so.

Q You have seen the quarterly statistical report here in New Orleans?

A Yes, sir. I saw it on the table one time. I didn't study it.

Q When was the last time you saw one of them?

A Maybe six months ago.

Q They do have them for this area?

A Yes, sir.

Q And it is published from information that comes off of the terminal in the Board office?

A Yes, sir.

[16] Q On the quarterly statistical report, is it not a fact that they have a number of homes sold over a particular period of time?

A I don't recall that.

Q Do you recall whether the statistical report has a breakdown in this community in terms of the seasons?

A Well, they keep their data on a season basis, all computer services do.

Q Can you tell me any information at all that is included in the report?

A They have the homes that are listed for sale by the members of Realatron.

Q What else?

A Well, I think they report the prices, after they are sold. I am not even sure of that.

Q Do you know any companies that are members of Realatron?

A Dale Tynes, and I think all the major companies are. The only other one I can think of is Latter and Blum and Dale Tynes are the only two I know are on it.

[17] Q Am I to understand that you, as President of the Board, the information secured from Realatron is of no value to you?

A No, sir. I don't use it. I don't subscribe to it or have anything to do with it.

Q The Board, do they refer to it during the course of their meetings, the Board of Directors?

A No, sir, not to the service.

Q I am not talking about subscribing to the service, do they use the quarterly statistical report?

A No, sir.

Q If you would want a copy of the last four issues of the quarterly statistical report, where would you go to get one, Mr. Derbes?

A I believe you would have to go to a member of Realatron to get one.

Q Does the Board receive any rent for allowing this terminal to be at its address?

A I don't think, I don't believe we do. I don't know.

Q Who would know whether the Board is receiving rent for that?

[18] A Our accountant.

Q Who is your accountant?

A Phillip Marchese. I really don't know.

Q Is the Board an affiliate of any national boards of realtors?

A Yes, sir. I take that back — I really don't know the relationship between the Louisiana Realtors Association and the National Association of Realtors and the Real Estate Board of New Orleans. We usually belong to all of these groups, and you have to belong to all these groups to belong to one. The direct affiliation between the New Orleans Board and the State Association or the National Association, I really don't know the legal connection. The Real Estate Board of New Orleans is a separate entity under the law, as far as I know.

Q Do you know the practical effects of the relationship?



A Practically, if you have to belong to all three of them, presumably, you have to abide by the rules and ethics of all [19] three of them.

Q Would it be reasonable to conclude that the Board abides by the rules and regulations of the National Board of Realtors?

A I think so.

Q Where would I find a copy of the national rules and regulations that would apply to the Board?

A Presumably 155 East Superior Street, East Chicago, Illinois.

Q Would there be a copy in New Orleans?

A No, sir.

Q How would you know what rules and regulations affect your Board?

A Well, Sir, we have certain documents from them, suggested bylaws and that sort of thing.

Q What do you call those documents?

A Suggested bylaws.

MR. NELSON:

I would like, if you have a copy, I would like to see them, Mr. Ballin, in your office, the suggested bylaws or whatever rules and regulations promulgated by the National Board of [20] Realtors that are in the possession of Mr. Derbes or one of the employees of the Board.

MR. BALLIN:

If you wish to subpoena them, we would deal with it.

MR. NELSON:

I would ask if they would be voluntarily given under the court rules.

MR. BALLIN:

No, Sir. They are not pertinent to the issues at this stage.

MR. NELSON:

You mean the control of a local organization by a national organization does not pertain to interstate commerce, Mr. Ballin?

MR. BALLIN:

Not in this connection.

EXAMINATION BY MR. NELSON:

Q Are there any publications that come from the National Board of Realtors that are received by the Board?

A I think they have a weekly called Headlines.

Q Have you ever seen a copy of it, Mr. Derbes?

[21] A Yes, I think all realtors get a copy.

Q Are you in doubt, you said you think, are you in doubt about the publication?

A I don't know of my own knowledge that they receive it. I know the National Associations says that they send all their publications to the members of the Board. I am trying to give you what I know of my own knowledge.

Q We can conclude, therefore, as far as you are concerned, it is more likely than not that the National Board issues a weekly publication?

A Yes, sir.

Q It is more likely than not that the copies of this goes to the Board?

A Yes, sir.

Q Is this kept by the Board?

A Yes, sir, as far as I know.

MR. NELSON:

If I would like to see last year's copy of these, I would have to subpoena those?

MR. BALLIN:

Yes, sir.

[22] EXAMINATION BY MR. NELSON:

Q In fact, I do want to see the last four years.

A I don't know if they have them that long ago.

Q However long they have them, I will take them.

Other than that National Board of Realtors and Louisiana Board of Realtors, is the Board a member of any other state or national organization?

A I didn't say they were a member of the first two.

Q What would you call it affiliates or what?

A I would say affiliates.

Q Well, let's put it that way. I will ask the question, substituting the word affiliate for membership.

A An affiliate with the National Association for Realtors would have some affiliation with all of the

associates and institutes of the National Association of Realtors. Other than that, I know of none other.

Q Does the Board pay dues to the National Association of Realtors?

A Well, the individual members pay dues, and [23] at the time they pay their dues, I believe that they have one collection agency for all three of the groups, then, I think on a local basis, and you contributed, but your invoice is, you know, shows clearly what the dues for each of the groups are.

Q What is the name of the organization that collects the dues?

A Real Estate Board of New Orleans, I think.

Q Do you collect or don't you collect, do you believe they collect it?

MR. BALLIN:

Just a moment, Mr. Nelson. The witness has the right to either state that he has positive knowledge or that he believes. I don't think you have the right to quarrel with the witness, if he is not sure, and he makes a statement that he believes.

MR. NELSON:

All right.

MR. BALLIN:

If he believes, he believes; if he knows, he knows.

[24] THE WITNESS:

Let me just explain. I excluded from there the possi-



bility that somebody pays their dues directly. So, I am going to be technically correct to you.

EXAMINATION BY MR. NELSON:

Q I understand there are no doubts that the Board collects money from some realtors and forwards that to the National Organization?

A That was not your question. Your question was, do all of them do, and I am reasonably certain that they collect the dues for most of the realtors, for state and national associations.

Q All right, now, what is the National Board of Realtors, what is it?

A It is an independent entity, which is incorporated, I believe, in the state of Illinois, and it is a professional trade organization, an organization of individual members, called realtors, throughout the whole United States. They have a copyright on the word realtor.

[25] Q Do they have a particular insignia?

A Yes, Sir.

Q Can any realtor use the insignia?

A Yes, Sir.

Q Do you have to be a member of the National Board of Realtors to use the insignia?

A I would assume so, since it is copyrighted.

Q What services are provided by the National Board of Realtors?

A The usual services of most trade organizations, education, invention, publication, and that sort of thing.

Q What type of educational programs?

A Educational materials are published by the Board. If you have three hours, I can give them to you in about three hours.

\* \* \* \*

[30] MR. NELSON:

Thank you. Can you answer the question?

THE WITNESS:

Can I answer it, subject to your objection?

MR. NELSON:

We are not bound by the rules of evidence. You might be right in court, but I do not intend to use this in an unreasonable way. I sincerely feel that is a relevant question.

THE WITNESS:

I can only answer you with regard as to what happened if you came to me — so — we don't belong to any of them, and we would try to find a reputable agent in the location where you wanted a home, and refer that person to you and wish you good luck, and take no responsibility for any action of this other party, nor receive any commission there from.

EXAMINATION BY MR. NELSON:

[31] Q Do you have in your office a list of real estate agents that reside out of the state of Louisiana?

A Yes, sir.

Q From where did you get that list?

A The one that I normally refer to is the National Marketing Institute list of members.

Q Would you refer to that list, if I came to you and wanted to buy a home in another state?

A Yes, sir.

Q So, you would go to the list, wouldn't you, Mr. Derbes, wouldn't you?

A Yes, sir, I would go to the list.

Q You got that list from a national organization, didn't you?

A Yes, sir. It is a member of the National Association of Realtors, it is an affiliate of the National Association of Realtors.

Q That is a relocation list, isn't it?

MR. BALLIN:

Just a moment — look — I am going to —

[32] MR. NELSON:

Strike the question.

EXAMINATION BY MR. NELSON:

Q What would be the purpose of you having a list of out of state realtors in your office?

A To endeavor to help my fellow man.

Q To buy a home outside of the state of Louisiana, if he so needs it?

A If he needed any kind of real estate services.

Q Included in that would be to buy him a home outside of the state of Louisiana, if he so needed it?

A Yes, sir.

Q That list comes to you from the National Marketing Institute?

A Yes, sir.

Q Do you pay dues to the National Marketing Institute?

A Yes, sir.

Q Are there yearly meetings of the National Marketing Institute?

A Yes, sir.

Q The National Marketing Institute is an affiliate of the National Association of [33] Realtors?

A Yes, Sir.

Q Do you know the national address of the National Marketing Institute?

A 155 East Superior Street, Chicago, Illinois.

Q Is that the same address as the National Association of Realtors?

A Yes, sir.

Q What is the purpose of the National Association of Realtors?

MR. BALLIN:

Object to that question, that calls for an opinion. He is not an officer of the National Association, and he is the wrong person to ask that question.

(Off the record)

EXAMINATION BY MR. NELSON:

Q Would we conclude from that, Mr. Derbes, that you do not know what services are rendered by the National Association of Realtors?



MR. BALLIN:

Don't answer that question. Jack, again, —

[34] MR. NELSON:

I am going to keep presenting it, Mr. Ballin, and as long as you tell him —

MR. BALLIN:

Don't ask questions, putting the answer in your question.

MR. NELSON:

We are discovering here, Mr. Ballin.

MR. BALLIN:

I know it is discovery, but you have to ask him questions and not put the answers in the questions.

MR. NELSON:

I am dealing with an educated man. I don't want to trick him. Your instruction to the man is not to answer, is that correct?

MR. BALLIN:

Yes, Sir.

EXAMINATION BY MR. NELSON:

Q Other than this one organization that you testified to, the National Marketing Institute, do you know the names of any other organizations that facilitate [35] relocation moves?

MR. PRICE:

Objection. That suggests something that is not in the record, and there is no testimony in here that the National Marketing Institute's purpose is to assist in relocation of home buyers anywhere, Jack. That is an unfair question.

MR. BALLIN:

Reword your question. Your aim is proper, but the question is improper. Reword that question.

MR. NELSON:

For your benefit, I will do it.

EXAMINATION BY MR. NELSON:

Q Mr. Derbes, you have a list of real estate agents in states outside of Louisiana, in your office, is that correct?

A Yes, Sir.

Q They are from every state, Sir?

A Yes, Sir.

Q Do you know everyone of them?

A All of the thousands of brokers and so forth?

Q Yes.

[36] A No, sir.

Q About how many are on that list that you have in your office?

A I don't know. It is probably over twenty thousand.

Q In your office?

A There is one book, but twenty thousand names.

Q That is published by the National Marketing Institute?

A Yes, sir.

MR. NELSON:

I would like to take a look at that book, at some time, just take a look at it.

MR. BALLIN:

The same thing holds.

MR. NELSON:

I want to see that book with the twenty thousand names.

MR. BALLIN:

We will not produce it voluntarily.

\* \* \*

[45] MR. BALLIN:

I suggest that you read the last sentence, which —

MR. NELSON:

Wait, we are getting to it.

THE WITNESS:

I do now recall hundreds of houses that I know of my own knowledge were sold by the builders without the interposition of a real estate broker.

EXAMINATION BY MR. NELSON:

Q And a friend?

A Well, I can not recall any about friends or relatives or through attorneys, at the present time. As far as builders, I think a few hundred of them.

Q Would it be reasonable to conclude, Mr. Derbes, that taking the builders out and taking the relationships of friends out or relatives out or attorneys at law out, that the vast, vast majority of other sales are made by real estate brokers or persons licensed in order to collect a commission?

A I think that if I may word it, it is reasonable [46] that more than probably, except for builders, friends, relatives and attorneys, that probably the majority of houses are sold by licensed real estate agents, that is, realtors and non-realtors, licensed real estate agents.

Q Now, in seven, essentially the function of a Louisiana real estate broker consists of counseling the purchaser or seller of real estate in the state of Louisiana, you concede that is true, right?

A Yes, sir.

Q You would also concede that one of the functions of a real estate broker could be to assist a seller in establishing a price for property, isn't that correct?

A Yes, sir.

Q And counseling a purchaser, would you say that real estate agents who have a knowledge of the market, the money market, availability of money to buy the home?

[47] A Yes, sir.

Q Does the Board do anything or have published anything or take any action at all in connection with attempting to encourage real estate agents to acquire



information necessary in the — to acquire information relative to the money market?

A They encourage them to be professional and perform a service, and in that regard, I would say, yes.

Q Now, you have, assist a purchaser or seller in bringing about agreement to purchase and sell — is it not a fact that as a result of your experience, before an agreement to sell is signed, some effort has been made to determine whether or not the purchaser can obtain financing, some effort is made?

A Not in all cases.

Q Would you say in some cases?

A Yes, sir.

Q Would you say in the majority of cases?

A Repeat the question.

Q That before the agreement to sell is signed, that there has been some effort made to [48] determine whether or not a purchaser can obtain financing?

A Yes, sir. The qualifications of a buyer, that is what we call it.

Q What role does the agent play in so far as you observed in determining the qualifications of the buyer?

A Whether he has a good credit rating and so forth, in other words, before the agreement is signed, it is just a question of trying to fit the purchaser to the right house type of thing, so you say, how are you going to handle the house and that sort of thing.

Q The real estate agent would ask the purchaser that?

A Yes.

Q Is it not a fact, that the counseling goes on between a person and the real estate agent in connec-

tion with when he has the money for the right house?

A Yes, sir, that is covered above.

Q Is it not true, in that connection, in a practical matter, as what goes on in the market, is that the real estate [49] agents at all times assist prospective buyers in their efforts to secure money?

A Would you define assist?

Q Calling a mortgage company, referring a purchaser to a mortgage company.

A Yes, sir.

Q Is it not a fact that in the overwhelming majority of cases, the obtaining of financing is handled by a lending institution?

A Yes, sir.

Q Now, does a lending institution, and I am talking about a homestead right now, and I will define, give you my definition of an institution, and let's take one of the homesteads, does it require a copy of an agreement to sell before it will start the process that winds up with a closing?

A Typically, yes.

Q Who prepares the contract to purchase itself, who prepares it?

A The agent or salesman that is handling the transaction.

[50] Q And the real estate agent secures that information from the prospective purchaser, is that correct?

MR. BALLIN:

You say that information —

MR. NELSON:

The information that goes on the agreement to sell and buy.

THE WITNESS:

He finds out what the man wants to pay for the house, certainly, and that sort of information he puts on there.

EXAMINATION BY MR. NELSON:

Q Does the real estate agent have the responsibility to see that those agreements are signed?

A He doesn't make a commission unless the agreements are signed. In that regard, he encourages their signature.

\* \* \* \*

[54] THE WITNESS:

Surveys may be, if there is a recent survey. I don't know about any other documents that they normally request.

EXAMINATION BY MR. NELSON:

Q Is it not a fact that in this area, that real estate agents normally show up at closures?

(Off the record)

THE WITNESS:

Yes.

EXAMINATION BY MR. NELSON:

Q And isn't it a fact, generally, agents in Orleans and Jefferson do not earn their commissions until the act of sale has been passed?

MR. BALLIN:

Jack —

MR. NELSON:

Mr. Ballin, there are two ways to do this. One is discovery and I am not limited to relevant information, if it leads to other information. We could subpoena the twenty thousand or [55] two thousand and ask them that question. I am asking the President of this industry, or at least an organization that represents this industry whether, in his opinion, that salesmen in this area earn their commissions — if the commissions are not earned until the act of sale, and am I to understand — well — you can interpose your objection —

MR. PRICE:

I am going to interpose an objection, Jack, because that calls for a legal conclusion on the part of this witness, and the agreement to purchase, providing under which of these agreements are entered into, that the commission is earned upon the signing of the agreement. As a matter of practice, it could very well be that most brokers or most realtors would say they wouldn't attempt to get a commission unless the act was passed.



MR. NELSON:

We have testimony different to that, that the commission is earned at [56] the time of the passing of the act.

MR. PRICE:

That is the way they treat it, but the commission is earned at the time of signing.

MR. NELSON:

I want him to testify to that.

MR. BALLIN:

He is one instrument I will give you without subpoena.

MR. NELSON:

Let's see if he can answer the question.

THE WITNESS:

It depends upon the contract and the clauses in the contract, as to whether the commission is earned. Some commissions are earned at the act of sale, and some commissions are earned prior to the act of sale.

EXAMINATION BY MR. NELSON:

Q And residences, homes, in this area, do you have an opinion as to whether the vast majority of agreements to purchase and sell, whether you earned your commission [57] at the act of sale or at the time the agreement was signed?

A At the time the agreement is signed or the conditions therefore are admit. (sic)

Q Is that a fact?

A Well, certainly.

Q So, if the commissions are earned, therefore, you admit?

A Well, certainly.

Q In your experience in this area, is it not a fact a deposit is usually accepted when an agreement to purchase and sell are signed?

A Yes, sir.

Q Is it not a fact that this deposit is placed easily with the company in an escrow account?

A Yes, sir.

Q Isn't it a fact that the escrow account is kept pending the closure?

A Yes, sir.

Q Isn't it a fact that the financial arrangements and accounting is made at the closure?

A Yes, sir.

Q Isn't it a fact that the amount picked up and [58] kept in the escrow account is included in the accounting?

A Yes, sir, whether it is a cash sale or a mortgage transaction, any kind of transaction.

Q In your affidavit, you state that brokers earn commissions upon procuring a purchaser or seller and essentially complete that function at the time. When you use the word essentially completed the function, what does this mean, Mr. Derbes?

A They have done most of what they need to do in connection with the transaction.

Q I would like to ask you what has to be done after the most — does the most mean all that they have to do?

A In many cases, yes.

Q Well then, when you use the word essentially completed your function, what else is included in here?

A Well, they try to make sure everybody is performing the conditions of the contract. In other words, you want to make sure the thing goes along, so you [59] stay in touch.

Q And that is one of the roles the agent plays?

A Oh, yes.

Q In your experience, have you ever recommended a particular homestead to a prospective purchaser?

A Yes, sir.

Q This is not an unusual situation?

A I am a member of the Board of one of the homesteads.

Q What homestead?

A Continental.

Q How many homesteads are in this city?

A Thirty-five, I believe.

Q And homesteads in Jefferson?

A Well, I was including Jefferson in there. There may be four or five in Jefferson, additionally, I don't know.

Q In the last five years, have banks been a source of financing for residences in Orleans and Jefferson?

A Yes, sir.

Q I am not talking about new development, I am talking about old homes.

A Yes, sir.

[60] Q Any other institutions besides banks and homesteads?

A A lot of institutions are involved in home lending.

Q Approximately how many banks are involved in home lending in Jefferson and Orleans in the last four years?

A Just about all of them.

Q Approximately how many in Orleans and Jefferson?

A Twenty, twenty-five.

Q Approximately how many other institutions are involved in the lending of residential homes in Orleans and Jefferson in the last four years?

A I don't have any idea. I'm not trying to be evasive, but all of the mortgage type and banking outfits, all of the small loan boys, everybody gets involved in financing a house.

(Off the record)

#### EXAMINATION BY MR. NELSON:

Q Mr. Derbes, I show you a copy of an agreement to purchase or sell, and it says, "For exclusive use of realtors, Standard [61] Form or Real Estate Board of New Orleans, Inc.," and I will mark this for identification as Derbes No. 1. You are familiar with this document?

A Yes, sir.

Q Under the terms of this document, does an agent have the authority to obtain a loan for a purchaser?

A No, sir.



Q Would you please look at it, on line sixteen, it says, "Should purchaser, seller or agent be unable to obtain the loan stipulated above," they are talking about the — what agents are they talking about in line sixteen?

A The one that facilitated the transaction.

Q And the agent has the authority to obtain a loan under this agreement?

A No, sir. I don't interpret it that way.

Q Does an agent have an authority under this agreement to obtain a loan if the seller or purchaser can't?

A I don't interpret it that way. The purpose of the wording that was inputted into this agreement was if the purchaser acted [62] in bad faith, and it was obvious that he could get a loan, and I think that in jurisprudence there are cases, that it shows there were cases that a loan could be obtained for a purchaser, and that is why it is worded agent to obtain.

Q But, the agent has the authority under the agreement to obtain the loan?

A I don't interpret that. That would mean that the purchaser would have the obligation to accept the loan. I don't read it that way. I don't see anything in there that would require a person to do that.

Q Even those based on interest, area and amount as stipulated under this agreement?

A That is correct. If the conditions of the contract are met, and somebody defaults, i.e. the purchaser, he has certain penalties. If the agent were to get a loan, that was readily available to the purchaser, and the purchaser didn't take it, he might accept the penalties in-

stead of taking the loan, and there is [63] no obligation in this contract that says he has to take the loan.

Q In your opinion, you could file suit for specific performance?

A Precisely

Q I think Mr. Price mentioned that commissions were earned at the time the agreement to sell and to buy was signed or you mentioned that?

A No, sir. I mentioned that commissions are earned depending upon the wording of the contract, and all those contracts are different.

Q What about this contract? At what time is the commission earned?

A I will read you, "The commission is earned by agent when this agreement is signed by both parties and when the mortgage loan, if any, has been secured."

Q As a matter of fact, under this particular document, the commission is not earned until the mortgage loan is secured, isn't that right?

A If you have a fast transaction and no conditional loan, if your conditions are [64] met at the time of signing.

Q What actually does that loan get that you just read in here?

A If you have a cash transaction and both parties sign the agreement, if you have a mortgage loan transaction, when the mortgage loan is obtained, after the agreement is signed, you earn the commission, not at the act of sale, and that is when the wording says, and I assume that is the way it is, and, so, there is a lot of custom agreements other than that used by realtors. It varies in case to case. I have seen many agreements, and

some of them with all this struck out (indicating), and it says earned at the act of sale and doesn't say anything else.

Q It is your testimony that in this area, the mortgage loan is as a normal course, the mortgage loan is made at the time different than the act of sale?

A No, the mortgage loan is usually made right at the same time as the act of sale. Some of them are made after, however.

[65] Q Mr. Derbes, how many lending institutions are members of the New Orleans Board of Realtors?

A I don't know the answer to that. There are many associate members which are people that just pay dues, maybe one or two.

Q I would like to get a list of all of the lending institutions that are members of the New Orleans Board of Realtors.

MR. BALLIN:

On subpoena.

MR. NELSON:

I have to subpoena it?

MR. BALLIN:

Yes.

MR. NELSON:

All right.

EXAMINATION BY MR. NELSON:

Q The question is, are there any homesteads or

other companies that have membership in the Board? Now, that is my question.

MR. BALLIN:

What is your answer — you don't know?

[66] THE WITNESS:

I don't know.

EXAMINATION BY MR. NELSON:

Q Is it your answer that you do not know whether there are any homesteads or mortgage companies that are members in the Board?

A I do not know that. I honestly do not know that. I told you earlier that the only affiliate member I know about is New Orleans East, and there are about four or five of them. This is a new type of membership classification that came along in the last six months.

Q You suggested homesteads that you knew.

A There may be.

Q Well, if the President doesn't know —

MR. NELSON:

Those are all the questions I have.

\* \* \* \*

EXAMINATION BY MR. NELSON:

Q [69] Mr. Derbes, how difficult would it be for you to collect publications of the Board, say over the last twenty-four months, how difficult would that be to collect that?



MR. PRICE:

Which Board?

MR. NELSON:

The Board we have been talking about. He has been using the word Board synonymously.

The question is, how difficult would it be, would it take you a week, two weeks, or what?

THE WITNESS:

I assume two or three days.

MR. NELSON:

How many people would it take?

THE WITNESS:

I assume it would take two people.

MR. NELSON:

I have no further questions for you, Mr. Derbes.

(Witness Certificate Omitted)

[462] UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Mar. 29, 1977

Deposition of STAN WEBER, taken in the office of Messrs. Nelson, Nelson & Lombard, Suite 1100, 344 Camp Street, New Orleans, Louisiana, on Tuesday, January 11, 1977.

APPEARANCES: (Omitted)

\* \* \* \*

[14] EXAMINATION BY MR. NELSON:

Q Mr. Weber, is it your testimony that the agent does not have any responsibility at all in connection with collecting the commission?

A I have to go on the same answer that Mr. Price just gave. The agent can be a carrier of the commission back to the office, but as far as collecting, he or she —

Q I am talking about the closing.

A The attorney disburses the funds and gives the check, if indeed there is a check. In a lot of cases there is not at the Act of Sale. The agent will then, indeed, bring back the check to the office.

\* \* \* \*

## EXAMINATION BY MR. NELSON:

[19] Q Who is, is any one person?

A Each branch manager, in each office.

Q Now, the seminars we are talking about, are these limited to agents within a particular office?

A No, sir, they are put out on a regular basis, stating this man from whatever company, will be there.

Q You have six hundred agents, and are they all notified at a particular time and place?

A They are all notified by a weekly bulletin that I put out about whatever is going to transpire.

Q The weekly bulletin is put out by you?

A Correct, the administrative office.

Q Where is the administrative office located?

A 3841 Veterans.

Q Whose responsibility is it to print the weekly bulletin?

A The administrative office.

\* \* \* \*

## EXAMINATION BY MR. NELSON:

[25] Q Mr. Weber, at any of these company wide meetings and seminars, are there topics dealing with federal statutes such as the availability of FHA/VA money discussed?

A I am sure that is what the mortgage companies are coming up to talk about.

Q To your knowledge, have you ever had somebody representing any government agencies address your company?

A Government agencies?

Q I am not talking about Fair Housing Act.

[26] A I can't come up with any government agencies that have been to our offices.

Q Do you keep a list of the number of agents that attend these company wide gatherings?

A Not that I know of.

Q As far as you are concerned, it has never been your company policy to keep a list?

A No, I don't want to.

Q How long have you been president?

A Ten and a half years. Since we opened.

Q Now, how do your agents go about generally securing listing agreements?

A I am not out there with them. I don't know how to answer your question.

Q You have no idea, is that your answer, you have no idea how they do this?

A I have no idea how they do secure a listing agreement.

Q How would you secure a listing agreement?

A When I was an agent?

Q Yes, sir.

A I secured them by referral basis.

Q Referrals from whom?

A People that knew someone that wanted to sell.

[27] Q At any of these office meetings, sales meetings, did any discussion ever address themselves to how do you secure listing agreements?

A Oh, I am sure there is, yes.

Q And could you give us a summary of the contents or general, just in general, the way about, what Stan Weber's policy is in this regard?



A I don't have a policy. No. All I can do is expose them to ways to get listings.

Q How does Stan Weber expose agents in ways to get listings?

A As I said before, my managers do this, and I don't do this. I have no idea of all the complexities that they get into.

Q You have no idea?

A Of the complexities that they get into, what they present to the agents on how to get listings was my answer to the question.

Q How would you define complexities for the record?

A Explanations, all the ramifications of the ways to secure listings, to use another [28] word, any ways that are obvious.

Q For the record, tell me the obvious ways.

A We listed the most obvious, references — for sale by owner is an obvious way to secure a listing.

Q Any others?

A The joining of certain organizations that would expose an agent to people. That would be a mobile association.

Q Any others?

A That would be the three most obvious.

Q Well, while we are on this subject, the joining of organizations, what organizations do you have reference to?

A I am talking about an agent belonging to a church or civic organization or things of that nature.

Q Now, my questions I am going to ask you are go-

ing to be limited to residential housing, one, two, three, four occupancy family homes.

A Okay.

Q Have you ever in your experience in the real estate business ever secured a listing on behalf of a person living outside of [29] the state of Louisiana to sell property within the state of Louisiana?

A Repeat that again?

Q Have you ever obtained a listing agreement from someone who lives outside of the state of Louisiana to sell his property or her property that is located inside the state of Louisiana?

A I am sure we have. I can't recall a name or any particular instance. I am sure in the past that has transpired.

Q Do you keep a list of listing agreements for people that own property in Louisiana, but those people live outside of the state?

A Would I keep a list, a separate list?

Q Any kind of a list.

A Are you talking about as a separate entity from anything else?

Q If I wanted to know how many of these?

A No.

Q What about a list of people, could you secure a listing agreement from someone who has a residence in the state of Louisiana but wanted to sell a piece of [30] property outside of the state?

A I am not licensed outside of Louisiana.

Q You can only sell within the state of Louisiana?

A Yes.

Q If a person wanted to sell property outside of the state and comes to you, would you refer them to an out of state agency, or would you handle the matter and contact an out of state agency?

A If I knew someone that was a friend of mine, where they were going, I would indeed give them a buzz and send them.

Q Would you be entitled to some kind of commission?

A It depends on who I am talking about. In some instances, yes, and in some no, it would just be a buddy transaction.

Q What would be the deciding transaction of whether you get a part of the commission?

A If it was a buddy of mine, and he would reciprocate with me, then, I wouldn't take a commission. If I didn't know the man at all, it is possible it would be a referral commission.

[31] Q There is no statute or regulation or rule to prohibit you from sharing in the sale of those commissions from out of state sale of property?

MR. MC CALL:

The witness cited a referral commission. You are now talking about a commission for the sale of property. I think the witness should understand the question, and I submit the question in its existing form is unclear.

MR. NELSON:

Do you think it is unclear?

THE WITNESS:

Well, it carried on so far, I would go along with this gentleman. I didn't catch fully the whole thing. I was going to ask you to repeat that one, because it went on in such a length.

EXAMINATION BY MR. NELSON:

Q The hypothetical situation is a resident in the state of Louisiana who comes to you, to Stan Weber, to sell a piece of property outside the state, let's say [32] in Mississippi. Now, would you, as a matter of policy, would you refer this person to an agent in Mississippi, or would you contact an agent in Mississippi?

A No, we would contact an agent in another state.

Q Would there be, to your knowledge, any law or rule or regulation that would prohibit you from sharing in a commission that is earned on the sale of that particular piece of property?

A On a commission earned on this sale, there would be a problem, but in regards to the referral commission, no.

Q What is the usual referral commission on a piece of residential property, do you know?

A Let's see — it is going to be ten per cent in the organization that I belong to.

Q What organization is that?

A Homes for Living.

Q Ten per cent of what?

A Of the commission that the other broker collects.

[33] Q So, if the other broker collects six per cent, you would get ten per cent of six per cent, is that correct?



A Uh-huh. (Affirmative response.)

Q Now, Mr. Weber, one of your agents secures a listing agreement to sell residential property, and the next, would you say the next problem they have is to sell that piece of property?

A Yes, sir.

Q Now, what do you, does Stan Weber Company and Associates Incorporated, do they do anything as a company in order to assist various agents to sell or to secure purchases?

A I would have to say, yes.

Q What is this?

A Advertisements that you have in the newspapers.

Q Who decides in your company what particular piece of property would be advertised in the newspapers?

A Our branch managers.

Q So, you have fifteen people deciding what pieces of property go in, is that correct?

A Yes.

[34] Q There is no one person in Stan Weber that has the ultimate responsibility?

A That is right.

Q Does Stan Weber pay for the advertising?

A Yes.

Q Are payments for advertisements, do they come out of the main office?

A Correct.

Q How does the main office know what listings

were advertised in the paper by the various branch offices?

A They call in to the ad department.

Q Who is in charge of your ad department?

A Theresa somebody. I don't know her last name either.

Q We want that last name.

A Brushyer. (Spelled phonetically)

Q She works in your main office?

A Yes, sir.

Q Actually what are her responsibilities?

A To write ads.

Q For the newspapers?

A Yes.

Q Does she have the responsibility to prepare or secure any advertising other than the [35] newspapers?

A No, that is the only thing she does.

Q How many newspapers, number wise, in this state, would you advertise your property in?

A Well, probably three.

Q Times Picayune would be one, of course?

A I put that together with the States Item and in the Guide Newspapers.

Q Do you ever have to do any advertising on radio?

A No, sir. Wait a minute — I did one in that twenty-four month period, but it was commercials.

Q Television?

A No, sir.

Q Would you think it important for these agents to keep up to date with the interest rates and the money market?

A Would it be to their benefit? Certainly.

Q Does Stan Weber Company, when I speak of Stan Weber, I am speaking about the company, does it do anything, furnish any information to its agents in connection with keeping them up to date [36] on the availability of money?

A The agent basically are the ones that secure the majority of the financing information. However, it is then given to the branch managers. The branch managers then will have the knowledge of the new money markets or something of this nature.

Q So, your company does not —

A It might be some of my branch managers that might take and initiate activities themselves, or if a mortgage company calls them directly to get the information out quicker.

Q Why would it be important to your agent to be up to date about the availability of money from various mortgage companies, banks, et cetera?

A I think that is an obvious answer. They naturally know the best money market, and they can do the best selling job, to be able to get the best monthly payments to the purchaser.

Q So, when you say purchaser, we are talking about the home buyers, is that correct?

A Correct.

[37] Q Now, is it not a fact that no money is earned by Stan Weber or the agent until the act of sale is passed?

A That is correct.

Q Now, in connection with your sales meetings, to

your knowledge, have you ever included any information as to actually what goes on in an act of sale?

A I am sure that is transpired, to take them out of the fear of all you lawyers.

Q Would you say it is important for an agent to learn about mortgage and conveyance certificates, what they represent?

A Just for the factual information, to explain to them to their clients, when they are apprehensive in an act of sale.

Q Is it not a fact that agents generally cooperate with the lending institutions in securing copies of act of sales, surveys or any documents that may be needed in connection with determining whether or not a title is valid?

A Usually an attorney will request an act to secure those documents for them, unless it happens to be an assumption sale.

[38] Q You are talking about the attorney for the lending institution?

A Correct.

Q So, that would be the usual procedure, wouldn't it?

A That an attorney will request from an agent certain things? Yes.

Q It is the agent's responsibility would be to contact the prospective purchaser to get that information?

A No, it would be from the seller.

MR. PRICE:

I think you have gotten off on a very generalization here, which is completely unfair, and I am going to



interpose an objection to this line of questioning. Mr. Weber mentioned something about mortgage and conveyance certificates, and your line of questioning seems to indicate that Mr. Weber's response to that is it is the usual procedure that attorneys go out and get an agent to run get the mortgage conveyance certificate.

\* \* \*

[46] Q Does Stan Weber pay dues?

A I pay yearly dues, yes, sir.

Q Do you have any other financial requirements to the organization?

A Other than the dues, no, sir.

Q Now, the Homes for Living Network, is there a main office?

A Yes, St. Louis, Missouri.

Q Do you have executive officers there full time?

A I'm sure they do.

Q Do you have a copy of the constitution and bylaws for this group?

A No, I wouldn't have any constitution or bylaws that is required for me to be a member. There might have some for their own corporation.

Q Do you have in your possession any rules or regulations promulgated by the Homes for Living Network?

A I am sure I have a contract.

Q I would like to get a copy of the contract and attach it to this deposition.

\* \* \*

[56] Q Mr. Weber, Home Equity and Home America, in connection with them, what are the referral fees?

A I would have to get all of the breakdowns, because there is a number of breakdowns.

Q I am talking about residential homes.

A I follow you. It is some different breakdowns, depending on the guy that starts. There are all different deals. You would have to consider all of those.

Q Other than the Homes for Living Network and Home Equity of Home America, are there any other national organizations that Stan Weber is a member of?

A The Home Builders Association. One of my men wanted to get into that to get referrals. I didn't think of that one.

Q Where are they located, do you know?

A No, just a local deal here.

Q How would that assist in getting referrals from out of the state?

A That wouldn't. That is what we alluded to back earlier, that an agent or an agent belonging to an organization would get referrals on the basis of [57] knowing people in organizations.

Q Are you a member of the Chamber of Commerce?

A Oh, yes. I didn't consider that national. I consider that local.

Q What efforts, if any, do you make in connection with determining what businesses are going to be located, what new industry is going to be located in this

area, how many people are going to be coming down here?

A We don't do anything at all.

Q You don't make inquiries?

A No, by the time you get those, they are dead.

Q Other than the listing of your name with these national organizations that refer, what you call, clients, would you call it?

A Yes.

Q Clients — do you list with them any other information such as homes that are available, the general market in this area or any other information that is relevant to one who wants to make a decision to buy a home?

[58] A Yes, then, what we have for sale.

Q How would they know that?

A By supplying information to them.

Q Do they supply information on a regular schedule?

A Once a month.

Q Do you keep copies of that information that you refer to them?

A Yes.

Q I would like to get copies of whatever information is referred to these national organizations in connection with availability of residences in this area for the period of January '71 to 1975.

A I don't have records that far back.

Q I understand, just tell me that is all you have, and I will go with that.

Are your agents ever given any instructions at the sales meetings as to FHA/VA procedures or procedures required by FHA or VA for lending purposes?

A Oh, I am sure they are, yes.

Q Would you say it would be important for an agent to know this?

[59] A Well, of course, we are getting into a whole wide spectrum here. Are we talking about qualifications, what does a person have to do, if they are making money, are you referring to that or something else?

Q My question was, to your knowledge, at any of the sales meetings are your agents instructed as to the procedures required to secure an FHA and VA loans?

A Procedures is a strange word there to me. That is why I keep questioning you on it. If they are indeed given information, what is the requirement to buy an FHA, VA house? Yes, but the procedures are something else.

Q What are the various commitments that the Federal Housing Administration issues, the terminology of them?

A They get into so many things every week, and every week they change. We will supply them, and by the different mortgage companies that come to the people and tell them what it takes to buy an FHA/VA house, as far as financing, [60] and in terms of their salary.

Q You are concerned that your agents know enough about that to talk intelligently with the prospective buyer?

A That is all he wants to know, what it takes to qualify for FHA/VA loan.

Q You would expect your agent to know that?



A Yes, because if they didn't know, they would be hurting their own business. I would expect them to know. Whether they do or not, I don't know.

Q Mr. Weber, on page 735 of the yellow pages of the phone book for the city of New Orleans, there is a little advertisement, a piece of advertisement entitled, "Homes for Living Network," and has a little diagram of the continental United States. Was this particular diagram in which the United States was outlined, was that prepared by you or furnished to you for inclusion in this phone book for your national office?

A Actually the drawing was supplied, but not mandatory to use.

[61] Q If you wanted to use it, you used it, is that the way the national office referred it to you?

A It is my discretion to use it in that manner or another manner, and there are indeed other designs. It is not mandatory.

Q "We can help you buy, sell or trade a home anywhere in the nation," was that referred to you by the national?

A That is the wording they used on their advertising.

Q You are talking about Homes for Living Network?

A Yes.

Q Mr. Weber, other than this particular listing in the phone book on page 735 of the yellow pages, is Stan Weber listed anywhere else, to your knowledge?

A In the yellow pages, there is a block ad.

Q On page 732, you are talking about?

A Yes. To my knowledge, there isn't any other in the yellow pages under another category. However, I do not schedule the yellow pages advertising, and there could be another insert, but I can't [62] anticipate any other insert, to my knowledge, that there could be.

Q But, that is in the yellow pages and is there within your full knowledge?

A Oh, yes, but I can't conceive of any other listing under any other category — there is one other that just hit me, but still under real estate — right here (indicating) — I think it is there, yes, there it is. (Indicating) There are three places.

Q There is a listing on page 736 under the Jefferson Board of Realtors, Inc., is that right?

A Yes, it just hit me that was in there.

Q What local organizations are you a member of?

A Jefferson, Orleans and St. Tammany Boards of Realtors. You are talking about in regards to real estate?

A Yes, sir.

A Three organizations.

Q Are there any other organizations that Stan Weber is a member of other than those three dealing with anything else?

A The Jaycees, Better Business Bureau, Chamber [63] of Commerce, normal type things.

Q Mr. Weber, other than the organizations referred to, Stan Weber does not belong to any other organizations that offer referral services, sales of residences outside the state of Louisiana, is that correct?

A In residential?

Q Yes, sir, residential sales.

A There is one other organization, but I determined it to be basically commercial.

Q What is the organization?

A E-R-R-A-C, Errac — Employers Relocation — I don't know, but it is Errac. I just can't come up with those initials, what they stand for. It is not a referral organization. It is only an organization that is a roster of brokers in particular cities.

Q Do you pay regular yearly dues?

A No dues, just a roster — wait a minute — there might be dues for the booklet. I would hesitate to answer either way. I have to correct myself, but it is my understanding I don't have yearly dues [64] in regard to, as you referred to for the referral organizations. This is just people that are in what service that they do have, and it is more hooked up to appraising than it is to the sale of real estate, in my understanding.

Q Do you have any documents at your office indicating the nature of the organization?

A Oh, I'm sure there are some.

Q Could we get a copy of whatever documents indicate your membership in Errac, together with the purposes of Errac?

A Yes.

Q How many years has Stan Weber been a member?

A As well as my memory serves, we have been in the roster three or four years.

MR. MC CALL:

I thought the witness said that it is commercial, not residential.

THE WITNESS:

That was my interpretation, it was of commercial and appraising, and when they needed an appraisal and something in commercial. It is not an organization that I am involved in such as [65] Homes for Living and I know actually the scope of their business. I don't know what Errac. Someone asked me to get into it, because when they came to me, they knew the organization, and it was as simple as that.

MR. MC CALL:

That line of questioning is objectionable, and it goes beyond the line.

MR. NELSON:

I would like information, reserving whatever anybody else's objections would be, waiving relevancy or whatever.

THE WITNESS:

It is not a referral situation, whether one broker calls another broker or not. It is a situation where it is only a roster situation, to my understanding.

EXAMINATION BY MR. NELSON:

Q Could it be used for residential homes?

A I am sure it could be.

Q Mr. Weber, what percentage of your yearly business relates to the sale of residential [66] homes as compared to your sale of all property?

A I would say eighty-five to ninety per cent.



Q About eighty-five or ninety per cent of your work, the activity of Stan Weber, concerns itself with the sale of residential homes, is that correct?

A That is correct.

MR. NELSON:

I don't have any further questions, Mr. Weber. Thank you very much. Maybe one of these gentlemen might have some questions.

EXAMINATION BY MR. MC CALL:

Q Mr. Weber, I am Harry McCall, Jr., and I, along with Mr. Ballin, represent the Real Estate Board of New Orleans, and I just have a couple of questions with respect to your testimony.

First, with respect to your testimony about this referral service, is the referral commissions, I believe that is the term you used, which you receive, payable for any services rendered in the sale of the property itself?

[67] A We don't get involved at all in working with the property. It is only if indeed it is sold. It is not an involvement as a normal real estate agent, in trying to sell the house.

Q That payment is simply for putting the agent at the new location in touch with the purchaser, is that right?

A That is all it is to it.

Q With reference to your testimony that you gave regarding information agents be acquainted and provided with concerning money and interest rates and so forth. Is any of that information available only to real estate agents?

A It is available to anyone.

Q Is the agent furnished this information simply as an accommodation to the purchaser?

A That is what it amounts to.

Q Is there any compensation for furnishing this information?

A No, sir, there sure isn't.

Q Is an agent, is there any part that the agent plays in the completion of the real [68] estate sale?

A Our terminology might be different. I want to know what you mean by closing.

Q That is the act before the notary public.

A They had nothing to do with that.

MR. MC CALL:

Thank you. I believe those are my questions.

EXAMINATION BY MR. NELSON:

Q Mr. Weber, the escrow funds that are collected by your agents when the agreement to purchase is signed, that is kept by you initially, is that correct?

A Uh-huh. (Affirmative response.)

Q Now, that money represents part of the purchase price, is that correct?

A Right.

Q That does not represent the commission?

A No.

\* \* \* \*

[482] UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: May 31, 1977

JUDGMENT

For the written reasons on file herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Real Estate Board of New Orleans, Inc., Jefferson Board of Realtors, Inc., Gertrude Gardner, Inc., Latter and Blum, Inc., Waguespack and Pratt, Inc., Stan Weber and Associates, Inc., Sandra, Inc., Isabelle McLeod, d/b/a Isabelle C. McLeod, Realtors, and all other parties similarly situated, and against plaintiffs, James Jefferson McLain, Douglas Arthur Nettleton, Jr., Raymond Joseph Munna, Irving Hursch Koch, and all other parties similarly situated, dismissing plaintiffs' suit with costs.

New Orleans, Louisiana, this 31st day of May, 1977.

/s/ NELSON B. JONES  
NELSON B. JONES, CLERK

Approved as to form:

/s/ EDWARD J. BOYLE, SR.  
UNITED STATES DISTRICT JUDGE

Date of Entry: 6/1/77.



IN THE  
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1501

JAMES JEFFERSON McLAIN, ET AL.,  
*Petitioners,*

versus

REAL ESTATE BOARD OF  
NEW ORLEANS, INC., ET AL.,  
*Respondents.*

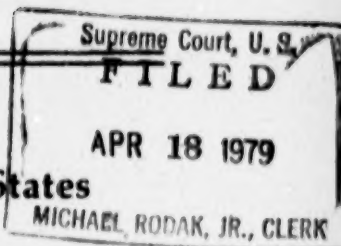
On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

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versus

REAL ESTATE BOARD OF  
NEW ORLEANS, INC., ET AL.,  
*Respondents.*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW

The district court's dismissal of petitioners' complaint (Pet. 17a-23a)<sup>1</sup> is reported at 432 F. Supp. 982.

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<sup>1</sup> References (Pet. . . . a) are to Petitioners' Appendix. Reference to Petitioners' Certiorari Petition are indicated as (Pet. . . .). "App. . . ." refers to the Appendix filed with the Court of Appeals.



The Fifth Circuit's affirmance (Pet. 24a-43a) is reported at 583 F.2d 1315.

### QUESTION PRESENTED

Whether this Court should grant certiorari to review a judgment dismissing petitioners' Sherman Act complaint under F.R. Civ. P. 12(b)(1) for petitioners' admitted (Pet. 7) failure to prove, after an evidentiary hearing, that real estate brokerage services are an integral part of any interstate commerce related to residential real estate transactions in Greater New Orleans.

### COUNTERSTATEMENT OF THE CASE

Petitioners, an uncertified class of purchasers and sellers of residential real estate, filed a complaint on October 30, 1975 charging respondents, the Real Estate Board of New Orleans and various of its members, with fixing real estate sales commission rates in violation of Section 1 of the Sherman Act. (Pet. 2a). Significantly, in the 19 months between filing and dismissal, petitioners produced not one shred of evidence to support their broad, conclusory price-fixing allegations.

Petitioners alleged that respondents' real estate brokerage activities are in or affecting interstate commerce because many of respondents' clients are persons moving into Greater New Orleans from out-of-

state, and because respondents assist clients in securing real estate financing and insurance that is obtained from out-of-state sources. (Pet. 8a-9a).

Respondents moved to dismiss, asserting that petitioners' interstate commerce allegations were without basis in fact. In support, respondents submitted the still uncontradicted sworn affidavits of two Real Estate Board officers testifying that:

(1) there is no requirement, legal or otherwise, that real estate purchases or sales be made with the assistance of a real estate broker;

(2) real estate brokers are not instrumental in securing real estate financing or title insurance;

(3) a real estate broker's primary function, for which he or she is licensed to operate solely within the State of Louisiana, is to counsel prospective purchasers and sellers of real estate located in the State of Louisiana with a view toward concluding mutually satisfactory agreements to purchase or sell; and

(4) the brokers' function is complete when he or she procures for the client another person qualified either to purchase or sell the property in question.

Extensive memoranda were submitted and oral argument had on respondents' Motion to Dismiss,

following which the district judge called a pre-trial conference on September 3, 1976 at which he expressed the opinion that, in order to satisfy the subject matter jurisdiction requirement, petitioners would have to meet the test of *Goldfarb v. Virginia State Bar*, 421 U.S. 772, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) and that further discovery was needed on this issue.<sup>2</sup>

A further pre-trial conference was held on October 13, 1976, at which time discovery with respect to the jurisdictional issue was ordered to be completed no later than December 31, 1976.<sup>3</sup>

During the four months of discovery that ensued after the September pre-trial conference, petitioners produced some evidence that certain real estate mortgage funds and title insurance policies are secured or guaranteed by out-of-state sources. None of

<sup>2</sup> The minute entry on this conference reads, in pertinent part: "The Court advised counsel that it appeared plaintiffs may satisfy said jurisdictional requirement only by bringing the facts of this case within the parameters of the Supreme Court's holding in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572, 1975. It is recognized, however, that further discovery is needed on the issue of *Goldfarb's* applicability *sub judice*. More specifically, such discovery should determine whether, in the first place, there is the requisite interdependence between the brokerage activity of defendant and the financing and/or insuring of real estate transactions in the New Orleans area and, secondly, whether there is a substantial involvement of interstate commerce in such real estate transactions *via* the financing and/or insurance aspects thereof." App. 247a-8a.

<sup>3</sup> App. 262a. On application of the plaintiffs, this cut-off date for discovery was subsequently extended to January 14, 1977, App. 272a-3a.

petitioners' evidence, however, refuted that of respondents, which showed that real estate brokers play little or no role in the financing or insuring of real estate transactions.

Presented with this admitted failure by petitioners (Pet. 7) to prove that real estate brokerage services are an integral part of any interstate commerce, the district court ultimately granted respondents' Motion to Dismiss and the Fifth Circuit affirmed, under F.R. Civ. P. 12(b)(1).

## REASONS FOR DENYING THE WRIT

### I.

#### Summary of Argument

Contrary to petitioners' arguments, there is no conflict between the decisions below and any other decisions of this Court. Importantly, petitioners apparently agree. Notwithstanding the bold title of Part I of the Petition, (Pet. 7-15), i.e., "The Decision Below Conflicts With This Court's Decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)," petitioners ultimately concede that (1) *Goldfarb* actually applied "conventional" interstate commerce analysis to the facts of that case (Pet. 10); (2) the courts below applied the "exact same [*Goldfarb*] analysis to the relation between [respondents'] brokerage services and interstate commerce in land transactions" (Pet. 10); and that (3) the error of the courts below was not that their



decisions conflicted with *Goldfarb's* analysis, but rather that they followed *Goldfarb* too carefully:

Petitioners submit that the courts below erred in assuming that the exact analysis by which this Court found jurisdiction in *Goldfarb* is the only manner in which jurisdiction can be found. (Pet. 15).

Petitioners' real complaint is that the *result* below conflicts with the *Goldfarb result*, notwithstanding the fact that the *results* here and in *Goldfarb* were reached via the same analytical route. In truth, petitioners seek to have this Court review and expand its *Goldfarb* holding.

Respondents' confusion over "conflicting decisions" continues in Part II of the Petition (Pet. 15-17), with the broad claim that there are "numerous conflicting decisions in the trial and appellate courts" on the issue decided by the Fifth Circuit. Analysis demonstrates that (1) the only allegedly conflicting *appellate* decision, *Sapp v. Jacobs*, 547 F.2d 1170 (7th Cir. 1977), is an *unreported* decision which, under the Seventh Circuit's own Rule 35, "may not be cited in any other federal court within the circuit for any purpose except *res judicata*, collateral estoppel, or law of the case"; (2) nowhere do petitioners cite *Diversified Brokerage Service, Inc. v. Greater Des Moines Bd. of Realtors*, 521 F.2d 1343 (8th Cir. 1975), which decision agrees with the decisions below, and which (by virtue of the non-precedential status of the Seventh Circuit's decision in *Sapp v. Jacobs*,)

makes the decisions at the circuit court level (Fifth, Sixth, Eighth and Tenth) in complete accord; (3) all but one of petitioners' allegedly conflicting trial court decisions are readily distinguishable; and (4) out of apparent desperation, petitioners claim that *United States v. Long Island Bd. of Realtors*, 1972 Trade Cases ¶ 74,068 (E.D.N.Y. 1972) is a "conflicting" case, whereas it is an agreed consent decree, not a litigated case, with no precedential value.

Finally, in accord with *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1935), and the decisions interpreting F.R. Civ. P. 12(b)(1), petitioners, although given ample opportunity, did not sustain their burden of proof on the subject matter jurisdiction issue, and failed to put facts in the record at the trial level to support a finding of an effect on interstate commerce. In this and several other recent cases, the Fifth Circuit has exercised its inherent power of control over its district courts by approving the practice of separating contested jurisdictional issues from the merits of an antitrust case. See, e.g., *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972). This approach provides a vehicle to reduce the burgeoning case load of the nation's second largest circuit, and enables antitrust defendants to test jurisdiction and avoid the substantial financial burden of defending on the merits where subject matter jurisdiction is absent.

## II.

**The Decisions Below Do Not Conflict  
With Any Decision Of This Court**

This Court answered the question presented here over thirty years ago in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). There, the Government charged that a taxicab holding company violated Sections 1 and 2 of the Sherman Act by monopolizing (1) taxicab sales to operating companies in Chicago, Pittsburgh, New York and Minneapolis, and (2) the operation of intracity taxi service in Chicago. Defendants argued that the complaint did not allege a restraint on interstate commerce, and the district court granted defendants' motion to dismiss. On direct appeal, this Court reversed and remanded.

This Court first considered whether the sale of taxicab vehicles was in interstate commerce. Since defendants' factory was in Michigan, and their customers were in Illinois, Pennsylvania, New York and Minnesota, such sales were held to be plainly interstate.<sup>4</sup>

<sup>4</sup> 332 U.S. at 225. Once it determined that the alleged restraint acted directly upon interstate commerce, this Court made short shrift of defendants' contentions that the quantity of interstate commerce restrained was small, or that the restraint was unimportant when compared to the total interstate commerce in the United States. This Court declared that "The Sherman Act is concerned with more than the large, nationwide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved." 332 U.S. at 226.

This Court then turned to the interstate commerce effects of defendants' intracity taxicab service — the object of the second count of the Government's complaint. Two separate aspects of defendants' service were analyzed: (1) defendants' contracts with railroads to transport interstate passengers between connecting trains located at different Chicago railroad stations; and (2) the defendants' general intracity taxi service. This Court held that the former service affected interstate commerce, but the latter did not.

Examining defendants' service between railroad stations, this Court found that railroad passengers remained in interstate commerce while they moved between stations, and concluded that

[The taxicab ride] must be viewed in its relation to the entire journey. So viewed, it is an *integral* step in the interstate movement. 332 U.S. at 229.

The opposite conclusion was reached when defendants' general intracity taxi service was analyzed. The Government argued that the defendants' general service affected interstate commerce because many travelers began or ended interstate journeys by taking taxis to or from railroad stations. This Court held, however, that this service was not subject to the Sherman Act because its effect on interstate commerce was wholly incidental. This Court distinguished the general intracity service from that between railroad stations as follows:



We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation "between any two points within the corporate limits of the City." None of them serves only railroad passengers, all of them being required to serve "every person" within the limits of Chicago. They have no contractual or other arrangements with the interstate railroad. Nor are their fares paid or collected as part of the railroad fares. In short, their relationship to interstate transit is only casual and incidental. 332 U.S. at 230-31.

In sum, the teaching of *Yellow Cab* is that Sherman Act jurisdiction exists only if an alleged restraint acts *directly upon* interstate commerce, or is an *integral and inseparable* part of another transaction that involves substantial interstate commerce. *Yellow Cab* likewise holds that wholly local activity that is only *incidentally or fortuitously* related to interstate commerce is not subject to the Sherman Act.<sup>5</sup>

<sup>5</sup> This Court and others have consistently followed these principles over the last three decades. See, e.g., *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 475 U.S. 738 (1976) (intrastate hospital service affected interstate commerce because services generated substantial purchases of out-of-state medical supplies); *Burke v. Ford*, 389 U.S. 320 (1967) (interstate liquor wholesaler conspiracy affected

This Court applied *Yellow Cab* in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the case petitioners misread to support their Petition. In *Goldfarb* a class of residential real estate purchasers charged that minimum fee schedules promulgated by state and county bar associations for real estate title examinations violated Section 1 of the Sherman Act. The defendant bar associations contended, among other things, that title examinations did not affect interstate commerce for purposes of the Sherman Act. The Fourth Circuit reversed the district court's finding in favor of plaintiffs,<sup>6</sup> and held that title examinations only "incidentally" affected interstate commerce.<sup>7</sup>

This Court reversed, noting first that the transactions at issue involved substantial interstate commerce because (1) a significant amount of mortgage money came from out-of-state lenders, and (2) significant amounts of real estate loans were guaranteed by federal agencies headquartered in Washington, D.C.

interstate commerce because conspiracy directly affected interstate shipment of liquor); *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (intrastate sugar beet production affected interstate commerce because sugar beets were essential raw material of sugar sold in interstate commerce); *Lieberthal v. North Country Lanes*, 332 F.2d 269 (2d Cir. 1964) (conspiracy to restrain bowling alley competition did not affect interstate commerce simply because bowling alleys served out-of-state customers); *Page v. Work*, 290 F.2d 323 (9th Cir.), cert. denied 368 U.S. 975 (1961) ("test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.")

<sup>6</sup> 355 F. Supp. 491 (E.D. Va. 1973).

<sup>7</sup> 497 F.2d 1, 15-19 (4th Cir. 1974).

421 U.S. at 783. This Court then found that the minimum attorney fee schedules were an *integral and inseparable* part of this interstate commerce because real estate lenders required, as a condition of the loan, that property titles be examined; under Virginia law, only attorneys can examine real estate titles.<sup>8</sup>

In short, this Court held that attorney title examinations had exactly the same effect on interstate commerce as the taxi service between railroad stations in *Yellow Cab*. At the same time, however, this Court reaffirmed *Yellow Cab's* holding that essentially local activity only incidentally affecting interstate commerce is not subject to the Sherman Act. As *Goldfarb* recognized, "Of course, there may be legal services that involve interstate commerce in other fashions, just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act." 421 U.S. at 785.

<sup>8</sup> As the Court reasoned:

Thus in this class action the transactions which create the need for the particular legal service in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade provided by the minimum-fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower. In financing realty purchases lenders require, "as a condition of making the loan, that the title to the property involved be examined . . . ." Thus a title examination is an *integral part* of an interstate transaction . . . (emphasis supplied) 421 U.S. at 783-84.

What *Goldfarb* plainly does not hold is what petitioners contend: that *any* product or service that relates to real estate is subject to the Sherman Act. Were this the holding of *Goldfarb*, it would not only fly in the face of over thirty years of antitrust jurisprudence, but also two hundred years of federalism. See *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Parker v. Brown*, 317 U.S. 341 (1943).

Petitioners' misunderstanding of *Goldfarb* is apparent from close analysis of the Petition. Not surprisingly, petitioners characterize *Goldfarb* as the "first decision" marking the "boundary of an entirely new area of antitrust jurisdiction to wit: residential real estate." (Pet. 8). Two pages later, however, petitioners concede that *Goldfarb* actually applied "conventional" interstate commerce analysis to the facts of that case. (Pet. 10). But in their next breath, petitioners attack the courts below for following *stare decisis*, and applying the "exact same analysis to the relation between brokerage services and interstate commerce in land transactions." (*Id.*). Petitioners finally conclude their *Goldfarb* analysis by saying what they really mean: the error of the courts below is not that they reached a conclusion that conflicts with *Goldfarb*, but that they followed *Goldfarb* exactly:

Petitioners submit that the courts below erred in assuming that the exact analysis by which this Court found jurisdiction in *Goldfarb* is the only manner in which jurisdiction can be found. (Pet. 15).



On the contrary, the district court and the Fifth Circuit properly applied *Goldfarb* and refused petitioners' invitation to stand the federal system on its head. Indeed, the Fifth Circuit was moved to make the following comment on the constitutional consequences of petitioners' *Goldfarb* analysis:

In conclusion, we speak to the applicants' argument that the full realization of congressional policies mandates expansive judicial construction of the commerce clause . . . . Juxtaposed against this [argument], however, is the growing spirit of federalism manifested at all levels of judicial and legislative decision-making. This momentum is fueled by the realization that state processes are available to combat the full gamut of wrongdoing, often including alleged restraints of trade. (583 F.2d at 1324, Pet. 41a)

### III.

#### **Petitioners' Complaint Was Properly Dismissed Under F.R. Civ. P. 12(b)(1) For Failure To Prove Subject Matter Jurisdiction**

The Fifth Circuit affirmed the dismissal of petitioners' complaint for lack of subject matter jurisdiction under F.R. Civ. P. 12(b)(1). Unlike a F.R. Civ. P. 12(b)(6) motion for failure to state a claim, a Rule 12(b)(1) motion does not presume that plaintiff's pleadings are true, but rather challenges the adequacy

of the allegations that purport to confer jurisdiction on the court.<sup>9</sup> If a Rule 12(b)(1) attack is made, the burden is on the plaintiff to prove that the requisite jurisdictional facts exist. See *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1935); *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972); 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1363.

Respondents put petitioners' interstate commerce allegations squarely in issue by moving to dismiss petitioners' complaint because the challenged activity lacked the necessary interstate commerce nexus. After four months of discovery, all petitioners were able to show is that some amount of New Orleans real estate financing money and loan guarantees may come from out-of-state sources, and that some New Orleans real estate titles may be insured by out-of-state agencies. Petitioners produced not one shred of evidence linking real estate brokerage services to this allegedly substantial amount of interstate commerce. Indeed, petitioners

<sup>9</sup> The Fifth Circuit described the nature of a Rule 12(b)(1) attack as follows:

Thus, we view the proceedings below as what the Third Circuit might call a 12(b)(1) "factual attack." *Mortensen v. First Federal Sav. & Loan Ass'n.*, 549 F.2d 884, 890-891 (3d Cir. 1977). Such an evaluation challenges more than the sufficiency of the allegations: it questions the existence of the underlying jurisdictional facts. "In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist. *Id.*, at 891. (Pet. 25a).

flatly concede here that they "failed to establish that the challenged activity (brokerage service) is an 'essential integral part of the transaction inseparable from its interstate aspects.' " (Pet. 7).

Petitioners' concession is correct, since the testimony of New Orleans real estate brokers demonstrated that real estate brokers have little, if any, role in real estate financing and title insurance in New Orleans. From this uncontroverted evidence, the district court drew the following "inescapable" conclusions:

Those real estate financing officials who were deposed consistently testified that, while brokers customarily contact mortgage companies to solicit financing information on behalf of clients and on occasion even transport clients to the company offices, *the actual financing process involves only the lender and borrower and the brokerage service is in no way an integral aspect thereof . . . .* With regard to title insurance, it also appears through deposition testimony that the actual procurement process takes place between the insurer and lending institution/purchaser, the only contract between an insurer and broker being that the former does provide information concerning its services to various realtors . . . . *The inescapable conclusion to be drawn from the evidence is that the participation of the broker in these*

*(presumably interstate) phases of the real estate transaction is an incidental rather than indispensable occurrence in the transactional chain of events. (emphasis supplied) (Pet. 21a).*

Plainly, petitioners were afforded a full opportunity to prove what this Court held in *Goldfarb* is required before Sherman Act jurisdiction will attach: that real estate brokerage services are an integral and inseparable part of substantial interstate commerce involved in New Orleans residential real estate transactions. This petitioners admittedly failed to do (Pet. 7). When respondents proved to the contrary that real estate brokerage services are, at best, wholly incidental to any interstate commerce, the courts below had no choice but to follow this Court's holdings in *Yellow Cab* and *Goldfarb* and dismiss petitioners' complaint under Rule 12(b)(1).

#### IV.

#### There Is No Conflict Among The Lower Courts

Circuit court decisions addressing facts similar to those presented here uniformly hold that real estate brokerage services are not subject to the Sherman Act.

The Sixth Circuit came to this conclusion nine years ago in *Marston v. Ann Arbor Property Mgt. Ass'n.*, 422 F.2d 836 (6th Cir. 1970), *aff'g*, 302 F. Supp. 1276 (E.D. Mich. 1969). In that case, plaintiffs charged that an apartment



owners association conspired to fix rental rates, and that interstate commerce was affected because many of them were from out-of-state. The district court dismissed plaintiff's complaint for lack of subject matter jurisdiction, and the Sixth Circuit affirmed *per curiam*. See, also, *Cotillion Club Inc. v. Detroit Real Estate Bd.*, 303 F. Supp. 850 (E.D. Mich. 1964).

The Eighth Circuit reached a similar result in *Diversified Brokerage Service, Inc. v. Greater Des Moines Bd. of Realtors*, 521 F.2d 1343 (8th Cir. 1975), which petitioners fail to even cite. There, plaintiff charged that his exclusion from the defendant Board violated the Sherman Act. The plaintiff's sole basis for interstate commerce jurisdiction was that some of the defendant Board's members served clients who had moved from out-of-state. Granting defendant's motion to dismiss, the court made short shrift of this contention, citing *Yellow Cab*:

Following the rationale of *Yellow Cab*, the cases uniformly hold that the mere movement of individuals from one state to another does not transform those services into interstate services within the meaning of the Sherman Act. [citations omitted]. 521 F.2d at 1346.

Two recent cases decided by the Tenth Circuit are in accord. In *Income Realty & Mtg., Inc. v. Denver Bd. of Realtors*, 578 F.2d 1326 (10th Cir. 1978) and *Bryan v. Stillwater Bd. of Realtors*, 578 F.2d 1319 (10th Cir. 1977) that court held

that real estate brokerage services do not affect interstate commerce, affirmed dismissals of Sherman Act complaints in both cases.

Not only do the Sixth, Eighth and Tenth Circuits agree with the Fifth that real estate brokerage services do not affect interstate commerce, but also they agree that antitrust jurisdictional issues may be tested separately from the issues on the merits. *Rosemound Sand & Gravel v. Lambert Sand & Gravel*, 469 F.2d 416 (5th Cir. 1972); see also *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1935). This approach provides a vehicle to reduce the burgeoning case load of district courts and enables antitrust defendants to test jurisdiction and avoid the tremendous financial burden of defending on the merits where jurisdiction is absent.

Faced with this uniformity among the circuits, petitioners are reduced in their search for a conflict among lower courts to an unpublished order of the Seventh Circuit, an antitrust consent decree, and assorted procedurally and factually distinguishable district court decisions. Petitioners must know that these cases in fact present no conflict because, rather than analyze these cases, petitioners simply list them according to their result. An examination of these cases quickly reveals that they are totally distinguishable from the instant case, with one exception.

Petitioners concede (Pet. 17), as they must, that a conflict among appellate courts can only be based upon

an unpublished Seventh Circuit reversal of a district court decision rendered on a wholly different set of facts. *Sapp v. Jacobs*, 408 F. Supp. 119 (S.D. Ill.), *rev'd* 547 F.2d 1170 (7th Cir. 1976), *cert. denied* 431 U.S. 968 (1977). Under the Seventh Circuit's Rule 35, an unpublished order may not be cited in any other federal court within the circuit for any purpose except *res judicata*, collateral estoppel, or law of the case. Thus even the Seventh Circuit views its action in *Sapp v. Jacobs* as being without any precedential value. An analysis of the district court's opinion shows why the *Sapp* reversal does not conflict with this case.

In *Sapp*, one shopping center developer sued another under the Sherman Act claiming that defendant conspired with a department store to cause that store to locate in defendant's proposed development rather than plaintiff's. Thus, *real estate brokerage services were not even in issue*. Plaintiff contended that interstate commerce was affected because out-of-state goods would flow into the area as a result of the development. 408 F. Supp. at 122.

Shortly after plaintiff in *Sapp* submitted its pre-trial statement, defendant moved for summary judgment under F.R. Civ. P. 56. By moving under Rule 56, defendant challenged the *legal* sufficiency of plaintiff's case, and the trial court was therefore required to presume that plaintiff's factual allegations were true.<sup>10</sup>

<sup>10</sup> As the district court said:

The May motion for summary judgment upon the antitrust counts against it was prompted by that factual statement by the plaintiffs. Thus, May took the position that all facts stated by plaintiffs, if true, do not provide a basis for federal jurisdiction under the antitrust laws . . . . 408 F. Supp. at 121.

Notwithstanding this presumption, however, the district court dismissed the complaint even though serious legal and factual questions remained concerning the adequacy of plaintiff's interstate commerce allegations. It was this decision, procedurally and factually distinguishable from the instant case, which the Seventh Circuit reversed without a published opinion.

Unlike defendant in *Sapp*, respondents here contend, as the Fifth Circuit held, that under Rule 12(b)(1) jurisdictional facts alleged by petitioners must be proved. Under Rule 12(b)(1), petitioners are not afforded the presumption that their allegations are true, but instead have the burden of proving that jurisdiction is present. This they failed to do after extended discovery granted by the district court.

Indeed, once the distinction between Rule 12(b)(1), on one hand, and Rules 12(b)(6) and 56, on the other, is understood, it becomes clear that many of the district court cases which petitioners list (Pet. 15-16) as conflicting with this case in fact represent no conflict at all. Most involved attacks on the sufficiency of the complaint or motions to dismiss before plaintiff had an opportunity to prove his jurisdictional allegations.<sup>11</sup>

<sup>11</sup> See *United States v. Jack Foley Realtors, Inc.*, 1977-2 Trade Cases ¶ 61,678 (D. Md. 1977) (allegations in indictment presumed true for purposes of motion to dismiss); *Gateway Assoc., Inc. v. Essex-Costello, Inc.*, 380 F. Supp. 1089 (N.D. Ill. 1974) and *United States v. Atlanta Real Estate Board*, 1972 Trade Cases ¶ 73,825 (N.D. Ga. 1971) (decisions rendered on pleadings); *Knowles v. Tuscaloosa Bd. of Realty Inc.*, No. 75-P-591 (N.D. Ala. 1975) and *Wiles v. Tampa Bd. of Realtors, Inc.*, No. 74-136 Cir. T-K (N.D. Fla.) (unreported orders denying pre-trial motions attacking pleadings). Each of these decisions turned on the specific facts pleaded in each complaint.



Petitioners' desperation in their search for a conflict among the lower courts is most vividly revealed by their reliance on *United States v. Long Island Bd. of Realtors*, 1972 Trade Cases ¶ 74,068 (E.D.N.Y. 1972). That case involved a consent decree containing nothing more than a pro forma recitation of the court's jurisdiction to enter judgment based on the settlement. It is axiomatic that antitrust consent decrees have no precedential value. See 15 U.S.C. §16(a).

When all of the cases decided on pleadings are eliminated from petitioners' list, only two remain. In *Oglesby & Barclift, Inc. v. Metro MLS, Inc.*, 1976-2 Trade Cases ¶ 61,064 (E.D. Va. 1976), a district court entered final judgment for plaintiff who was denied access to defendant's multiple listing service. It appears from the court's opinion that a jurisdictional challenge was never made. The other, *Mazur v. Behrens*, 1974 Trade Cases ¶ 75,070 (N.D. Ill. 1972), is simply a seven year old aberration. In *Mazur*, the district court mistakenly assumed that Sherman Act jurisdiction could attach from the mere fact that some clients of defendant real estate brokers were from out-of-state. This flatly contradicts *Yellow Cab's* holding that the use of local services by out-of-state consumers does not render those services subject to the Sherman Act.

Indeed, the Fifth Circuit itself draws the distinction between the use of local services by out-of-state consumers and the movement of out-of-state consumers for the express purpose of using the local services. In

*Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), the Fifth Circuit refused to dismiss a Sherman Act monopolization complaint by a low-cost abortion clinic against various local doctors. Plaintiffs asserted that interstate commerce was affected because, among other things, many out-of-state patients used plaintiffs' clinic. The Fifth Circuit found that those out-of-state patients were an integral part of the allegedly monopolized commerce because they crossed a state line for the *express purpose* of using the plaintiffs' abortion clinic. On this basis, the Fifth Circuit distinguished its decision in this case. Here, there is no evidence in the record that any of respondents' clients crossed state lines for the express purpose of purchasing New Orleans residential real estate.

As the Fifth Circuit said:

The Court's recent decision in *McLain v. Real Estate Bd. of New Orleans* is not to the contrary . . . . [In that case, the] court applied the substantial effects test and held that Sherman Act jurisdiction is not conferred by the allegation "that many of the defendants' customers are 'persons moving into and out of the Greater New Orleans area.' " . . . . That conclusion is unassailable because few people cross state lines *for the purpose* of purchasing residential real estate. The effects of the conduct alleged in this case . . . is that persons cross the Florida-Georgia state line for the purpose of

coming to the Center's Tallahassee clinic.  
(emphasis in original) 1978-2 Trade Cases ¶  
62,382 at 76,277 n.3.

### CONCLUSION

Petitioners' complaint was properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction. Indeed, plaintiffs concede that the district court's dismissal and the Fifth Circuit's affirmance correctly follow, rather than conflict, with "conventional" Sherman Act interstate commerce analysis by this and other courts. For these reasons, the Petition should be denied.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I certify this \_\_\_\_ day of April, 1979 that I have served three copies of the foregoing Brief in Opposition upon Mr. Richard G. Vinet, 144 Elk Place, Suite 1202, New Orleans, Louisiana 70112, Attorney for Petitioners, by mailing same, postage prepaid, addressed to him at his office.

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Harry McCall, Jr.

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

\_\_\_\_\_  
**No. 78-1501**  
\_\_\_\_\_

**JAMES JEFFERSON MC LAIN, ET AL**  
**Petitioners,**

**versus**

**REAL ESTATE BOARD OF NEW ORLEANS, ET AL**  
**Respondents.**

\_\_\_\_\_  
**ON WRIT OF CERTIORARI TO THE**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

\_\_\_\_\_  
**BRIEF FOR THE PETITIONERS**  
\_\_\_\_\_

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On Writ of Certiorari to the  
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for the Fifth Circuit

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BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinions, orders and judgment of the District Court (McLain Pet. App. pp. 17a-23a) are reported at 432 F. Supp. 982 (E.D. La. 1977). The opinion of the Court of Appeals (McLain Pet. App. pp. 24a-42a) is reported at 583 F.2d 1315 (5th Cir. 1978).



## JURISDICTION

The judgment of the Court of Appeals was rendered on November 15, 1978. A petition for rehearing was denied December 15, 1978 (McLain Pet. App. pp. 42a F.F.). On March 14, 1979 Application for Extension of Time to File Petition for Writ of Certiorari was granted by Mr. Justice Rehnquist, acting as Circuit Justice for the Fifth Circuit. This application extended the time for petitioning for certiorari from March 15, 1979 until April 2, 1979. The Petition For Writ of Certiorari was filed in this Court on March 31, 1979, and was granted on May 14, 1979. Jurisdiction of this Court is invoked under the provisions of 28 USC §1254(1).

## QUESTIONS PRESENTED

I. WHETHER a fixed commission equal to six percent of the purchase price of the home charged by all real estate brokers and agents in the Greater New Orleans area on sales of residential real property is a price fix subject to control under the anti-trust laws of the United States.

II. WHETHER the six percent fixed commission for real estate brokerage services charged by New Orleans area realtors in residential real property sales has a "substantial effect" upon the interstate commerce aspects of such transactions.

III. WHETHER buyers and sellers of homes in the Greater New Orleans area, and by implication,

throughout the United States, should have the advantage of fee-price competition in determining their choice of a real estate agent.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Article I §8 of the Constitution of the United States provides in pertinent part that:

The Congress shall have Power

....

to regulate commerce with Foreign Nations, and among the several States, and with the Indian Tribes;

...

B. 15 USC §1 provides in pertinent part that:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal.

C. 15 U.S.C. §15 provides that:

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue there-

for in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of this suit including a reasonable attorney's fee.

D. 15 U.S.C. §26 provides in pertinent part that:

Any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws.

E. 28 U.S.C. §1254(1) provides that:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

### STATEMENT

This private anti-trust action was brought by the named plaintiffs<sup>1</sup> individually and on behalf of a class

<sup>1</sup> James Jefferson McLain, Douglas Arthur Nettleton, Jr., Raymond Joseph Munna and Irving Hirsch Koch. Plaintiffs McLain and Nettleton are university professors of economics; plaintiffs Munna and Koch are lawyers.

consisting of all persons who bought or sold residential property in the parishes of Orleans and Jefferson<sup>2</sup> during the four years preceding the filing of the suit on October 31, 1975.

Made defendants were two real estate trade associations,<sup>3</sup> six named real estate firms<sup>4</sup> and a defendant class of real estate brokers and agents.<sup>5</sup>

Plaintiffs McLain and Nettleton purchased homes in New Orleans in 1972 and 1974 respectively. Plaintiff Koch sold a home in Orleans Parish in 1973 and purchased another in 1974. Plaintiff Munna bought a multi-family dwelling in Jefferson Parish during 1975. In connection with each of these transactions, one or more of the named defendant realtors provided broker-

<sup>2</sup> By population, Orleans and Jefferson Parishes comprise nearly 90% of the New Orleans Standard Metropolitan Statistical Area. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1978*, (Washington, D.C. 1978) p. 941.

<sup>3</sup> The Real Estate Board of New Orleans, and the Jefferson Board of Realtors.

<sup>4</sup> Gertrude Gardner, Inc., Latter and Blum, Inc., Waguespack and Pratt, Inc., Stan Weber and Associates, Inc., Sandra, Inc. and Isabelle McLeod d/b/a Isabelle C. McLeod Realtors.

<sup>5</sup> Complaint (McLain Pet. App. 1a-16a at 7a). The defendant class is alleged to include:

All Brokers who are Realtors and who transacted business in the Eastern District of Louisiana including but not limited to members and associate members of the Orleans and Jefferson Boards, and who were realtors at any time between the dates October 31, 1971 and October 31, 1975 and who, on information and belief, have provided real estate brokerage services, including a brokerage fee.



age service as buyer's or seller's agent, and in each case the realtor received a fee for his services.<sup>6</sup>

The suit alleges numerous restraints of trade,<sup>7</sup> but the primary averment is that the realtors through their trade associations and otherwise:

(s)hare in, exchange and artificially maintain fixed commissions and artificially raised prices through trade usage, customs and patterns as evidenced by multiple, listing services and widespread fee-splitting.<sup>8</sup>

Overt acts in furtherance of the alleged conspiracy to fix prices include attendance by realtors at association-al meetings, conventions and training programs at which price fixing is discussed, the publication of trade journals and other printed matter which discourage price competition, and participation by realtors in less formal meetings, telephone conversations and the like involving price fixing.<sup>9</sup>

The activities of defendants injure the plaintiffs in that fees and commissions are "raised, fixed and maintained at artificial and non-competitive levels". Inasmuch as the realtors' commission is a percentage of the

6 Complaint (McLain Pet. App. pp. 2a-3a, 5a-7a)

7 *Id.* at 10a-11a.

8 *Id.*

9 *Id.*

purchase price of the house, the presence of this artificial, non-competitive element of price both increases the cost of the house and reduces the proceeds of the sale received by the seller.<sup>10</sup>

At present, New Orleans area realtors charge six percent on the first hundred thousand dollars of the price and thereafter charge four percent.<sup>11</sup>

10 *Id.*

11 There is no evidence in the record to support this contention as to the actual percentage charged by New Orleans area realtors. It is however a matter of common knowledge which, to the extent that it has been relevant in the proceedings to date, has been judicially noticed. In any event, present counsel for plaintiffs referred numerous times to the six percent figure at oral argument in the fifth circuit, in his petition for re-hearing in that court, in his application for extension of time in this Court and in his Petition for Writ of Certiorari in this Court. None of the fifteen lawyers variously representing the several defendants has ever challenged the accuracy of the six percent figure.

Given the limited scope of discovery permitted by the trial court (see text at notes 19-20 *infra*) it would not have been possible to elicit evidence as to the actual percentages, nevertheless, six percent seems to be a fairly common rate nationwide. See: e.g. *U.S. v. Jack Foley Realty et al*, #78-5013 U.S. Court of Appeals for the Fourth Circuit, slip opinion pp. 15-16. The evidence showed a conspiracy to raise commissions from 6% to 7% in Montgomery County, Maryland; See Also: B. Owen, "Kickbacks, Specialization, Price Fixing and Efficiency in the Residential Real Estate Market" 29 *Stanford L. Rev* 931, 947 (1977) "Eighty five percent of new residential listings in San Francisco for the week ending May 31, 1976 specified 6% brokerage fees, the remainder specified 7% fee or a sliding scale that depended on the size of the transaction. (See however *Id.* at 947-8 n 110—"commissions may be reduced at the time of sale to in order to facilitate the transaction." The data are based upon 154 new listings for the week in question.)

After filing and service of the suit, an initial round of pleadings were exchanged.<sup>12</sup> On January 5, 1976 the court held a status conference, and at that time entered a "pre-trial order" which purported to regulate the progression of the lawsuit.<sup>13</sup>

This order provided that motions directed to service, venue, jurisdiction and the sufficiency of the pleadings were to be disposed of, followed by class certification motions for which limited discovery was permitted. Thereafter answers were to be filed, and plenary discovery on the merits was to commence. The lawsuit never progressed beyond the jurisdictional stage.<sup>14</sup>

Sixty days after the January 5, 1976 conference defendants filed a motion to dismiss for lack of jurisdiction under federal question and diversity, and for failure to state a claim upon which relief could be granted.<sup>15</sup>

This motion was supported by a memorandum and by affidavits of Mr. Dalton Truax, Jr. and Mr. Max

<sup>12</sup> Defendants Stan Weber and Isabelle McLeod filed general denial answers, the remaining defendants variously moved for extensions of time. See Docket entries 4-12. A. 7, 11.

<sup>13</sup> A. 15.

<sup>14</sup> *Id.* The classes were never certified.

<sup>15</sup> A. 18.

Derbes, Jr., two officers of the Real Estate Board of New Orleans.<sup>16</sup>

In substance, the affidavits provided that:

- (1) there is no requirement, legal or otherwise, that real estate purchases be made with the assistance of a real estate broker;
- (2) real estate brokers are not instrumental in securing real estate financing or title insurance;
- (3) a real estate broker's primary function . . . is to counsel prospective purchasers and sellers of real estate located in the State of Louisiana with a view toward concluding mutually satisfactory agreements to purchase or sell, and
- (4) the broker's function is complete when he or she procures for the client another person qualified either to purchase or sell the property in question.<sup>17</sup>

An initial round of briefing was had on the jurisdictional issue, and oral argument took place, followed by supplemental briefing. The matter was taken under submission. On September 3, 1976 a second confer-

<sup>16</sup> *Id.*

<sup>17</sup> Respondents Brief in Opposition to Petition for Cert. p. 3.



ence of counsel and the court was held. The motion to dismiss remained under submission.<sup>18</sup>

It was the opinion of the trial court that in order to satisfy the jurisdictional requirements it would be necessary to bring "the facts of this case within the parameters of the Supreme Court's holding in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975).<sup>19</sup>

Specifically the court ordered discovery to take place to determine:

*whether, in the first place, there is the requisite interdependence between the brokerage activity of defendants and the financing and/or insuring of real estate transactions in the New Orleans area, and secondly, whether there is a substantial involvement of interstate commerce in such real estate transactions via the financing and/or insurance aspects thereof.*<sup>20</sup>

During the four months following the September 3,

<sup>18</sup> Minute Entry September 3, 1976; A. 76.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (emphasis added). In the reported decision the trial court rephrased the first requirement as follows:

... whether the challenged activity is an essential integral part of the transaction and inseparable from its interstate aspects. 432 F.Supp. 982, 984 and McLain Pet. App. 20a-21a.

1976 conference numerous depositions were taken,<sup>21</sup> and plaintiff served a set of interrogatories<sup>22</sup> to which defendants objected,<sup>23</sup> and which on account of the dismissal were never answered.

Following the close of the limited discovery period,<sup>24</sup> further briefing was submitted and thereafter on May 31, 1977 the suit was dismissed. The dismissal according to the trial court was granted under rule 12 b 6 (failure to state a claim) converted to a summary judgment (Rule 56) to the extent that matters beyond the pleadings were considered.<sup>25</sup>

<sup>21</sup> Deposed were:

1. Patrick Turner, Dept. of Housing Urban Development Rec. Doc. 59.
2. Angel Miranda, H.U.D. economist. Rec. Doc. 52.
3. Paul Griener, Loan Officer, U.S. Veterans Administration (this deposition was inadvertently not filed by the court reporter)
4. James Mills, President Lawyers Title Insurance Co. Record Doc. 58.
5. Julian O. Hecker, President Carruth Mortgage Co. Record Doc. 55.
6. Edmond G. Miranne, President, Security Homestead Association, Record Doc. 53.
7. Max Derbes, Jr., President Real Estate Board of New Orleans, Record Doc. 60.
8. Alfred T. Post, Vice President Gertrude Gardner and Co. (Like the deposition of Mr. Greiner, Mr. Post's deposition never found its way into the record.)
9. Stan Weber, President, Stan Weber and Associates, Record Doc. 61.

<sup>22</sup> Docket Entry 39; A. 99.

<sup>23</sup> Docket Entry 49; A. 117.

<sup>24</sup> Additional Status Conferences were held October 13, 1975 and January 13, 1977.

<sup>25</sup> McLain Pet. App. 23a n 7.

In the Court of Appeals, the dismissal was affirmed although procedurally re-characterized as a 12(b)(1) "factual attack" upon subject matter jurisdiction.<sup>25</sup>

### SUMMARY OF ARGUMENT

Petitioners present three arguments in support of a jurisdictional finding in this case:

#### I

Petitioners submit in their first argument that the Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 is relevant in the instant case only to the extent that it identifies aspects of interstate commerce which must be shown to be involved in the local real estate market in order for antitrust jurisdiction to exist.

The *Goldfarb* Court identified financing and governmental loan guarantee activities as involving significant amounts of interstate commerce so that under an implicit "class of activities" rationale the financing transactions were characterized in *Goldfarb* as "interstate transactions."

The title search in *Goldfarb* was then held to be an "integral part" of such transaction. Like its predecessor *United States v. Yellow Cab*, 332 U.S. 218, *Goldfarb* is an "in commerce" case.

<sup>25</sup> McLain Pet. App. 25a n 1 and 40 a. Cf. *Mortensen v. First Federal Sav. and Loan Ass'n.*, 549 F.2d 884, 890-91 (3d Cir. 1977).

Petitioners contend that jurisdiction over realtors may not be found via an "in commerce" approach. Jurisdiction over the activities of realtors may be found through the application of the "affectation of commerce" doctrine of *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, and its progeny.

*Goldfarb* however held only with respect to the interstate aspects of the land market located in Fairfax County, Virginia, and to that extent *Goldfarb*, for jurisdictional purposes, requires a showing that significant interstate aspects attend the functioning of the land market in the locality in which the suit is brought — in this case Greater New Orleans, Louisiana. Once this showing is made, application of either "in commerce" or "affectation of commerce" methodology may be made to show the connection between the local activity at issue and the involved streams of commerce.

The dismissal of this case was based upon misapplication of the "in commerce" methodology of *Goldfarb* and *Yellow Cab* to the "affectation of commerce" situation that prevails with respect to price fixing by realtors.

#### II

In their second argument, petitioners contend that the real estate market in New Orleans satisfies the *Goldfarb* requirement of possessing significant interstate commerce aspects.



Evidence in the case, indicates that hundreds of millions of dollars in home mortgage funds enter the New Orleans market from sources without the State of Louisiana. In the case of one homestead, millions of dollars of loan capital are obtained annually by periodic borrowing from the Federal Home Loan Bank of Little Rock, Arkansas. These advances are secured by the pledge or delivery of previously executed notes from completed transactions across State lines to the pledgee of the notes. Similarly, local mortgage banks sell their paper in the secondary market.

Whether pledged or sold, the home mortgage note itself becomes an article of commerce, moving across State lines to the pledgee or the new holder, and there, like a magnet, attracts the monthly installment payments due thereunder into channels of interstate commerce. In the secondary market, the new holder of the note amasses these payments and pumps the money across state lines back into the local market or into other local markets as loan capital for subsequent transactions. It does not stretch analogy to suggest that the real estate closing in which the notes are created is like a manufacturing process for these articles of commerce. What then of the role of the realtor who brings buyer and seller together in the manufacturing transaction?

Governmental loan guarantees in the New Orleans area from VA and FHA combined exceeded 1 billion dollars as of 1975. Nationally, the figure exceeds one

hundred billion. The governmental agencies are all headquartered in the District of Columbia.

In addition to financing and loan guarantees — the *Goldfarb* aspects — petitioners have learned that procurement of title insurance is always an interstate transaction for Louisiana residents, there being no domestic title companies. In a single year, one company located in Richmond, Virginia wrote coverage exceeding two hundred million dollars in New Orleans and the surrounding area. Finally, a limited amount of evidence is offered concerning the interstate movement of people.

In the closing part of their second argument petitioners discuss and offer data concerning the scope of the real estate settlement costs problem nationally. Congressional concern is manifested in the language of §2(a) of the *Real Estate Settlement Procedures Act of 1974*, 88 Stat. 437. Information obtained from the legislative history of the Act indicates that the total settlement cost bill as of 1974 came to 14 billion dollars annually of which realtors' commissions, the largest single element, accounted for 40%. Ironically, title examination fees were the smallest element, accounting for less than 3%.

The "factual" nature of the second argument provides a basis for the Court to recognize that in New Orleans, in Fairfax County, Virginia and in local real estate markets throughout the United States, significant amounts of interstate commerce are involved. The

Court may also note the ever-widening scope of the real estate settlement cost problem nationally and the leading role realtors play in that problem.

### III

Petitioners' third argument seeks to relate the price fixing activities of realtors to identified streams of interstate commerce through an "affectation of commerce" approach.

Petitioners submit that the conceptual difference between "in commerce" and "affectation of commerce" doctrines is significant. "In commerce" cases make the interstate transaction depend upon the local restrained activity, as where the taxi ride between train stations in Chicago is said to be part of an interstate journey.

"Affectation" cases provide the opposite situation in which it is the local activity or market which depends upon the interstate movement of resources into and/or out of the local area. A local restraint operating in the local market, if it is found to unreasonably burden or stifle this movement of resources, is said to "substantially affect" interstate commerce giving rise to federal jurisdiction.

Several examples are drawn from the jurisprudence of this Court including: *Burke v. Ford*, 389 U.S. 320; *United States v. Employing Plasters Ass'n*, 347 U.S. 186; *United States v. Employing Lathers Ass'n*, 347 U.S. 198; *United States*

*v. Women's Sportswear Ass'n*, 336 U.S. 460; *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, and *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219. All show the characteristic pattern of local market dependence upon identifiable streams of interstate commerce.

The petitioners then discuss the role of the realtor in "making" the local market in land. Realtors merchandise homes. Other than direct sales of new construction by builders and sheriff's sales, realtors comprise about the only regular commercial activity devoted to the sale of residential and commercial property. If the local market is dependent upon interstate resources like financing, it is equally dependent upon the primary function of brokers in bringing together buyer and seller.

Given the demonstrated market dependence upon both local and interstate activity, a showing that a restraint upon the local activity substantially affects the interstate will satisfy the "affectation doctrine."

This effect is demonstrable as a matter of law under the *per se* rule of substantive antitrust law which holds that price fixing is so repugnant to the policy of free competition embodied in the Sherman Act, that an adverse effect will be presumed to exist in any market in which the fixed price is a relevant price. Jurisdictionally that avails nothing in a wholly local market like real estate but if the fixed price can be shown to be logically and economically relevant in another market which is



interstate, why wouldn't the substantive presumption of an adverse effect come to one's aid in showing jurisdiction?

The effect can also be demonstrated as a matter of logic and economics. Assuming that the seller raises his price to avoid the effect of the commission, the buyer, given only a fairly limited amount of cash to use as a down payment, must of necessity finance more of the purchase price and then amortize it with interest over a long period of time. If he does not keep the house but decides to sell, he re-enters the market, this time as a seller with a six percent commission of his own to pay — unless he can pass it along to the next buyer who in turn will finance relatively more of the purchase price.

Petitioners submit that the effect upon commerce is clear.

## ARGUMENT

### I

**The Application Of The Court's Decision In The Case Of *Goldfarb v. Virginia State Bar*, 421 U.S. 773, Extends Only To The Identification Of Relevant Streams Of Interstate Commerce Involved In Residential Real Estate Transactions.**

In *Goldfarb v. Virginia State Bar*,<sup>27</sup> the Court held that transactions in land, the most local commodity, have

<sup>27</sup> 421 U.S. 773 (1975).

interstate commerce aspects. Specifically, the Court addressed and resolved the question of "whether the Sherman Act applies to services performed by attorneys in examining titles in connection with financing the purchase of realty."<sup>28</sup> The Court found the Act to be applicable and invalidated the one percent minimum fee which title lawyers in Fairfax County, Virginia were theretofore required to charge under the minimum fee schedule promulgated by their County Bar Association.

The Sherman Act<sup>29</sup> reaches all activities in restraint of trade or commerce among the state, regardless of whether the activities are actually in the stream of commerce, or if not "in commerce" if they substantially affect interstate commerce.<sup>30</sup>

Since in *Goldfarb* the question of the application of the Sherman Act to the real estate market was a matter of first impression,<sup>31</sup> it was necessary for the Court to delineate the areas of interstate commerce involved in an inherently local real estate market.

<sup>28</sup> *Id.* at 780.

<sup>29</sup> 15 U.S.C. Section 1, relevant text set forth *supra* at pp. 3-4.

<sup>30</sup> This proposition hardly needs citation but see: *Goldfarb, supra* at 780:

Our inquiry can be divided into . . . steps did respondents engage in price fixing? If so, are their activities in interstate commerce or do they affect interstate commerce?

<sup>31</sup> *Id.*

The Court adopted the trial court's findings<sup>32</sup> that "a significant portion of funds furnished for the purchase of homes in Fairfax County comes from without the State of Virginia", and that "significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia."<sup>33</sup>

Having identified the amounts of interstate commerce as "significant,"<sup>34</sup> the Court, without further discussion, applied an implicit "class of activities"<sup>35</sup> rationale and thereafter referred to all financing aspects of the sale as "interstate transaction(s)."<sup>36</sup>

The streams of interstate commerce were therefore defined and it remained only to relate the title lawyers' activity to such commerce.

This the Court did by finding that lenders require a title examination "as a condition of making the loan,"<sup>37</sup>

32 *Goldfarb* had been tried on its merits, then reversed and dismissed in the Court of Appeal. Cf. 421 U.S. 773, 778 FF.

33 *Id.* at 783.

34 "Thus in this class action, the transaction which create the need for the legal services in question frequently are interstate transactions." *Id.* at 783-4 (emphasis supplied).

35 For a discussion of the development of the class of activities doctrine:

See: *Perez v. United States*, 402 U.S. 145, 150-154 (1971).

36 Thus a title examination is an integral part of an interstate transaction. *Goldfarb supra* at 784.

37 *Id.*

and concluded that the title examination was an "integral part" of the financing process.

Although the Court sought only a sufficient nexus with interstate commerce and did not specifically denominate *Goldfarb* as either an "in commerce" case or as an "affectation of commerce" case, the characterization of the local activity as an "integral part" of the interstate transaction strongly suggests that *Goldfarb* is an "in commerce" case. This view is supported by the fact that the Court analogized the title examination in *Goldfarb* to the taxi ride between train stations which was the only aspect of *United States v. Yellow Cab Co.*<sup>38</sup> for which Sherman jurisdiction was found to exist.<sup>39</sup>

Indeed, even the Justice Department in *Yellow Cab* sought only a ruling that would make the ride to the station or the ride from the station an actual part of the interstate journey. In short, neither *Goldfarb* nor *Yellow Cab* relied upon a showing of "substantial effect" upon commerce as do the line of affectation cases commencing with the *Mandeville Island Farms Case*<sup>40</sup> and most recently re-affirmed in *Hospital Bldg. Co. v. Rex Hospital Trustees*.<sup>41</sup>

The real estate brokers in the instant case stand on a different footing from the title lawyers in *Goldfarb* or

38 332 U.S. 218 (1947).

39 *Id.* at 228-9, cited in *Goldfarb*: 421 U.S. 773, 784 n. 13.

40 *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

41 475 U.S. 738 (1975).



the taxi drivers in *Yellow Cab*. Jurisdiction depends upon a different sort of analytical method than that employed in those two cases. Jurisdiction over realtors may be found via the *Mandeville Island Farms*, "substantial effects" approach.

Interestingly, the lower courts applied and relied upon *Goldfarb* and *Yellow Cab* as the basis for dismissal of this case.<sup>42</sup> Additionally, and with all respect to the panel members, the fifth circuit interpreted this Court's decision in *Burke v. Ford*<sup>43</sup> and in *United States v. Women's Sportswear Association*<sup>44</sup> in ways which are simply wrong.

Of *Burke*, the fifth circuit suggests that:

(b)ecause the entire liquor traffic . . . in Oklahoma . . . was distributed through the defendants (liquor wholesalers), the alleged restraint operated in an activity that was clearly a 'necessary' and 'integral' part of interstate commerce.<sup>45</sup>

42 From the trial court:

. . . we reiterate the view that it is only via the *Goldfarb* analysis that this action may be said to arise under the Sherman Act. (McLain pet. App. 19 at n. 3).

From the Court of Appeals:

"The distinction *Yellow Cab* draws between integral and incidental activities corresponds to the distinction between *Goldfarb* and the present case. Like the first cab operators . . . (between stations) . . . the attorney in *Goldfarb* were invariable and indispensable components of interstate commerce."

43 389 U.S. 320 (1967).

44 336 U.S. 460.

45 McLain Pet. App. 34 a.

*Burke v. Ford* however did not turn an "in commerce" consideration. The words "necessary" and "integral" although set off in quotes by the fifth circuit do not even appear in the *Burke* opinion. No reading of the *Burke* decision even implies this sort of analysis and with good reason.

*Burke v. Ford* is undoubtedly an affectation of commerce case. It follows directly from the *Mandeville Island* line of cases. In *Burke* this Court makes no attempt to place the intrastate sales of liquor within the stream of interstate commerce in liquor. Had the Court applied an "in commerce" approach in *Burke* its holding would have been inconsistent with *Yellow Cab*. After all, if the ride to the railroad station is not part of the interstate journey why should the intrastate distribution of liquor be part of the interstate movement thereof. The analysis in *Burke v. Ford* is drawn entirely in terms of the economic effects of the reduction in competition in the Oklahoma liquor market in its relationship to purchases from out of state distillers. The language of *Burke* is quoted in the footnote<sup>46</sup> and the analysis is entirely economic. In fact, in a footnote to the *Burke* opinion this Court compares the rate of increase of intrastate liquor sales with the rate of increase in personal income of Oklahoma residents over a corresponding

46 "Horizontal territorial divisions almost invariably reduce the competition among the participants. . . . When competition is reduced, prices increase and unit sales decrease. The wholesalers territorial division here almost surely resulted in fewer sales to retailers — hence, fewer purchases from out of state distillers — than would have occurred had free competition prevailed among the wholesalers. 389 U.S. 320, 321-2.

period to show a disparity presumably related to the absence of competition among liquor wholesalers.<sup>47</sup>

*Women's Sportswear* is the source of the famous quotation by Justice Jackson to the effect that: "(i)f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."<sup>48</sup> Clearly, it is not an "in commerce" case.

Although there is certainly no bright dividing line between the "in commerce" and the "affecting commerce" approaches, and while undoubtedly some factual situations may require the application of both approaches, it is clear that the "in commerce" methodology is inapplicable to the present case and reliance by the lower courts on the "in commerce" aspects of *Goldfarb* and *Yellow Cab* was clearly misplaced. To this extent these cases are entirely inapposite.

Petitioners would conclude this portion of their argument by reiterating the premise that the crucial relevance of *Goldfarb* lies in what it said about *land*, and not in what it said about title lawyers and their place in the scheme of things relating to interstate commerce. The relation of the realtors to these interstate aspects is the subject of a later portion of this brief.<sup>49</sup>

<sup>47</sup> *Id.* at 321 n.2.

<sup>48</sup> 336 U.S. 460, 464.

<sup>49</sup> See Argument III *infra* at note 101 ff.

## II

The Local New Orleans Real Estate Market Satisfies The *Goldfarb* Requirement Of Possessing Significant Interstate Commerce Aspects, And Certain Of Those Aspects Are Of Such General, Nationwide Prevalence That They Exist As A Matter Of Law In Residential Real Estate Markets Throughout The United States.

### A. Introductory Statement:

*Goldfarb* required a showing that substantial interstate commerce aspects attend the functioning of the real estate market in Fairfax County, Virginia.<sup>50</sup> Such a showing would appear a pertinent first step in any jurisdictional inquiry directed toward a given local real estate market.

Since land is the ultimate local product, the economic boundaries of any land market are plainly a matter of geography. For practically all buyers, the utility of acquiring a home in a given real estate market is a direct function of the proximity of the home to other relevant locations in the buyer's life — such as his place of employment. Likewise, the seller can't choose to sell his house in any market other than the one in which it is located.<sup>51</sup> The term "national real estate market" is

<sup>50</sup> See text at notes 31-36 *supra*.

<sup>51</sup> The general level of home prices in New York is generally irrelevant to the seller of a home in Mississippi or any place else for that matter.



simply a construct representing the aggregate of all of the geographically discrete local markets. *Goldfarb* arose in a different local market than the present case, and so petitioners would here show that "evidence"<sup>52</sup> in the present case demonstrates that there are significant interstate commerce aspects involved in the New Orleans real estate market just as there are in Fairfax County, Virginia. In addition to evidence concerning the interstate nature of the primary financing and governmental loan activities identified in *Goldfarb*, petitioners have obtained testimony relating to the functioning of the secondary mortgage market, and the interstate procurement of title insurance. Finally, although to a somewhat lesser extent, there is evidence of market factors relating to the interstate movement of people which in the case of realtors involve out of state referrals, participation in national relocation services, and general considerations of societal mobility.<sup>53</sup>

52 The evidence consists entirely of depositions taken pursuant to the limited discovery permitted by the trial court. The court read these depositions but no evidentiary hearing was ever had in this case, respondents claim to the contrary notwithstanding. See Respondents' Opposition to Petition for Writ, at p. 2.

53 Petitioners would caution against attempting to formulate any general theory of the interstate commerce aspects of local real estate transactions which placed too much emphasis upon the movement of people across state lines. Often accidents of geography and certainly factors other than conditions in the local housing market would all play a role in individual decisions to move from one state to another. Certain factors such as financing title insurance and government loan guarantees would appear to prevail in all real estate markets irrespective of location and therefore offer more uniformly applicable criteria.

Whether proof of significant interstate aspects should be required in every case arising in every residential real estate market, or whether this Court should judicially notice that financing, loan guarantees, title insurance and the like are sufficiently prevalent interstate commerce features of any local real estate market so as to eliminate the jurisdictional necessity of such proof in every case is a question to which petitioners would also address themselves in this portion of their brief.

Supplementing the statistical information presented by the United States in its excellent *amicus* brief,<sup>54</sup> petitioners will offer additional data and will urge this court to declare as a matter of law that transactions in residential real estate markets, throughout the United States are possessed of significant interstate aspects.

#### B. *The Interstate Nature of Real Estate Financing.*

In accordance with permissible discovery in the lower court, petitioners deposed the presidents of two New Orleans area lending institutions:<sup>55</sup> Security Homestead Association, a savings and loan, and Carruth Mortgage Corporation, a mortgage banking company. Both of these corporations are heavily involved in the financing aspects of residential sales

54 See United States' Brief: pp. 9-10.

55 Mr. Edmond G. Miranne and Mr. Julian Hecker.

transactions. Both do substantial amounts of business and their business requires significant interstate activity.

Security Homestead is one of about 38 savings and loan associations in the New Orleans Area.<sup>56</sup> It is one of the largest Savings and Loan Associations in the State of Louisiana.<sup>57</sup> During the period 1972-1976, it lent a total of one hundred ninety two million five hundred fifty five thousand, two hundred and ninety four (\$192,555,294.00) Dollars in five thousand and sixty four (5064) residential real estate closings.<sup>58</sup>

It obtains money from deposits by investors at least some of whom reside out of state.<sup>59</sup> It obtains significant amounts of loan capital by borrowing from its "mother bank",<sup>60</sup> the Federal Home Loan Bank of Little

<sup>56</sup> A. 147.

<sup>57</sup> A. 123.

<sup>58</sup> A. 124. The year by year breakdown is as follows:

Year	Number of Notes	Dollar Amount
1972	724	\$22,815,948.00
1973	946	31,724,220.00
1974	798	33,076,400.00
1975	1040	42,814,172.00
1976	<u>1556</u>	<u>62,124,554.00</u>
	5064	\$192,555,294.00

<sup>59</sup> A. 131. There are thirty six thousand five hundred twenty seven savings accounts.

<sup>60</sup> A. 128.

Rock, Arkansas.<sup>61</sup> In order to secure these advances which fluctuate as more money is needed or as portions of the debt are retired, Security pledges home mortgage notes. Pledge is a bailment or delivery of a thing of value to a creditor as security for the debt. Between 1972 and 1976, Security Homestead pledged Three Thousand five hundred eighty four (3584) first mortgage notes for an aggregate value of ninety million four thousand seven hundred thirty six and no/100 (\$90,004,736.00) Dollars or about 47% of its total loan production over the same period.<sup>62</sup> Additionally, in late 1975 or early 1976 Security entered the secondary mortgage market and began selling its paper to "Freddie Mac", a subsidiary of the Federal Home Loan Bank of Little Rock. During the first year of this operation some four million dollars in notes were sold.<sup>63</sup>

<sup>61</sup> A. 141 only end of year balances are available, these are as follows:

YEAR	DOLLAR AMOUNT
1972	\$2,000,000.00
1973	4,500,000.00
1974	12,240,000.00
1975	15,029,500.00
1976	22,729,500.00

<sup>62</sup> A. 143. The figures are:

Year	No. Notes Pledged	Amount of Notes
1972	322	\$ 6,936,215.00
1973	391	9,137,485.00
1974	899	22,645,395.00
1975	925	23,801,520.00
1976	<u>1047</u>	<u>27,484,121.00</u>
	3584	\$90,047,736.00

<sup>63</sup> A. 133, Mr. Miranne, president of Security also testified that his company deals with "Fannie Mae", the Federal National Mortgage Association, another quasi governmental secondary mortgage corporation. See: A. 130.



But whether sold in the secondary market or pledged to the Home Loan Bank, a transmittal of the notes across state lines, in this case to Little Rock, Arkansas, is required. A corresponding movement of funds back to Security takes place. The money is used either to fund present commitments or to make future loans. It is a cycle.<sup>64</sup>

In reality the notes themselves become articles of commerce and move across state lines. Analogizing a bit, the real estate transaction which gives rise to the negotiable paper partakes of the nature of a manufacturing process. The question of whether a local manufacturing process is within the reach of Sherman was laid to rest by this court in *Standard Oil*<sup>65</sup> about 70 years ago.

Carruth Mortgage Corporation, the other deponent, is an Arkansas Corporation doing business in Louisiana, Mississippi and Texas.<sup>66</sup> It has three offices in the New Orleans Area. Carruth is a mortgage bank.<sup>67</sup> Its business is to originate home loans, then sell the paper in the secondary market. The loans are closed and then maintained by Carruth until funds are needed to make new loans. At that time, the earlier loans (the inventory) are re-sold principally to "Fannie Mae"

<sup>64</sup> A. 159-60.

<sup>65</sup> *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>66</sup> A. 175.

<sup>67</sup> *Id.* Unlike Security Homestead, a savings and loan association, there are no savings accounts or depositors.

and "Gennie Mae", both quasi governmental corporations involved in the secondary mortgage market. "Fannie Mae" is headquartered in Washington, D.C., but Carruth deals with its Dallas, Texas office.<sup>68</sup>

Over the period 1971-1976 Carruth made home loans in excess of one hundred and fifty million dollars in Orleans and Jefferson Parishes.<sup>69</sup>

The overwhelming majority of home loans made by Carruth are guaranteed by the F.H.A. or V.A. Over the period 1971-1976 seventy nine percent (79%) of the dollar value of home loans made by Carruth in Orleans and Jefferson were guaranteed by either FHA or VA.<sup>70</sup> With respect to F.H.A. loans, Carruth collects and remits premiums for the guarantee to the FHA in Washington, D.C. on a periodic basis for each account.<sup>71</sup>

<sup>68</sup> A. 191-92. Also A. 205. Data on the volume of this business was unavailable; however, since there are no depositors or investors to provide capital for future loans, one must presume, that it is the major source of Carruth's loan capital.

<sup>69</sup> See A. 206 for a year by year breakdown of loan production in Orleans and Jefferson. See note 70 for totals.

<sup>70</sup> *Id.* Relative percentages are as follows:

1972-1976		
	Dollar Amount	% of Total
FHA	\$ 33,318,475.00	22
VA	86,341,270.00	58
Conventional	<u>31,774,232.00</u>	<u>20</u>
	\$151,434,277.00	100

<sup>71</sup> A. 190.

Carruth requires title insurance on all home loans it makes.<sup>72</sup> Carruth actively solicits loans from numerous sources but particularly through real estate brokers and agents.<sup>73</sup>

The operations of both of these institutions involve incredibly large amounts of money, much of which moves into Louisiana from sources without the State. The entire operation of the secondary mortgage market depends upon the resale in interstate channels of locally manufactured home loans notes, dependent for their creation upon the buy/sell transaction which depends in most cases upon the activity of the realtor in bringing together buyer and seller.

#### C. Title Insurance

Lawyers Title Insurance Company of Louisiana is a franchisee of Lawyers Title Insurance Corporation of Richmond, Virginia.<sup>74</sup> The local company acts as an agent for the parent insurer.<sup>75</sup> In 1975, Lawyers Title issued two hundred million dollars of coverage on commercial and residential property in the nine "river parishes" of which Orleans and Jefferson Parishes comprise the major metropolitan area.<sup>76</sup>

<sup>72</sup> *Id.*

<sup>73</sup> A. 199.

<sup>74</sup> A. 207.

<sup>75</sup> *Id.*

<sup>76</sup> A. 209.

Typically the insurance premium is collected by Lawyers Title at the time of the closing, and is later remitted to the parent company in Virginia.<sup>77</sup>

Of the twenty seven title insurance companies writing coverage in Orleans and Jefferson Parishes, all are headquartered outside the State. The one domestic title insurer of which Mr. James Mills, president of Lawyers Title of Louisiana, was aware is no longer in business.<sup>78</sup> Thus for Orleans and Jefferson home buyers obtaining title insurance is always an interstate transaction.

The average premium for title insurance is approximately one percent for a fifty thousand dollar policy although the actual percentage is computed on a sliding scale, depending upon the value of the house and/or the extent of the coverage.<sup>79</sup>

#### D. Federal Loan Guarantee Activities

Available data for VA loan guarantee activities in Orleans and Jefferson Parishes indicate that between 1945 and 1975 the VA insured loans on forty five thousand nine hundred fifteen homes (45,915) for a total value of seven hundred twenty million one hundred ninety two thousand eight hundred thirty seven and no/100 (\$720,192,837.00) Dollars.<sup>80</sup>

<sup>77</sup> A. 215.

<sup>78</sup> A. 216.

<sup>79</sup> A. 219.

<sup>80</sup> A. 70.



Specifically, between 1973 and 1975 loan guarantees for the two parishes were issued on five thousand three hundred thirty one homes, and the total value guaranteed was One hundred forty five million, six hundred eighty two thousand, eight hundred sixty three and no/100 (\$145,682,863.00) Dollars.<sup>81</sup> It should be remembered that the VA guarantees only the first \$17,500.00 of the purchase price of each home.

FHA loan guarantees issued between 1934 and 1973 for Orleans and Jefferson Parishes covered fifty one thousand five hundred nineteen (51,519) homes for a total value of six hundred eighty three million nineteen thousand eight hundred twenty three and no/100 (\$683,019,823.00) Dollars.<sup>82</sup> Other than new construction, figures on loan guarantees in Orleans and Jefferson for the single year 1973 indicate one thousand forty five loan guarantees for a value of ten million two hundred twelve thousand seven hundred and no/100 (\$10,212,700.00) Dollars. New construction is not included because often, particularly in subdivisions, the initial sale of a new home is made by the builder without the involvement of a realtor.

<sup>81</sup> A. 71.

<sup>82</sup> Original Record at p. 126. The relevant figures are:  
HOME MORTGAGES 1973

PARISH	TOTAL INSURED		NEW CONSTRUCTION ISSUED	
	No.	Amount	No.	Amount
Jefferson	1896	\$26,838,650.00	1014	\$19,779,700.00
Orleans	325	6,267,500.00	162	3,113,750.00
	2221	\$33,106,150.00	1176	\$22,893,450.00

The figure in the text represents the total insured less the new construction.

E. *National Relocation Services, Out of State Referrals, and the Movement of Persons Across State Lines.*

The depositions of two area realtors are excerpted in the appendix.<sup>83</sup> Additionally the brief *amicus curiae* filed by the United States offers an excellent discussion of this aspect of interstate activity involved in real estate markets, throughout the nation.<sup>84</sup> Plaintiffs' interrogatories directed to these issues were never answered, and plaintiffs have little to offer by way of evidence in this area.

However, as pointed out previously,<sup>85</sup> patterns of migration into or out of specific local real estate markets would undoubtedly depend upon many factors including accidents of geography. The extent to which migration or emigration occurs within a given local real estate market is probably not sufficiently uniform to provide a general criterion of interstate commerce involvement. Without denigrating the relevance of this factor, plaintiffs would suggest that the financing, title insurance, and governmental loan guarantee activities supply criteria of substantial interstate involvement which are uniformly present in *all* real estate mar-

<sup>83</sup> A. 236-287.

<sup>84</sup> See United States Brief, *amicus curiae*, pp. 9-10.

<sup>85</sup> See footnote 53 *supra*.

kets,<sup>86</sup> and plaintiffs respectfully suggest that these factors should be more important in the formulation of a general theory of interstate involvement in local real estate markets.

F. *The Scope of Real Estate Settlement Costs Nationally.*

Section 2(a) of the Real Estate Settlement Procedures Act of 1974<sup>87</sup> provides in pertinent part that:

The Congress finds that significant reforms are needed to insure that consumers throughout the nation . . . are protected from unnecessarily high . . . (real estate) . . . settlement charges.<sup>88</sup>

Under the Act, "settlement services" are defined to include, ". . . services rendered by a real estate agent or broker."<sup>89</sup>

<sup>86</sup> One case: *United States v. Greater Syracuse Board of Realtors, Inc.*, 449 F. Supp. 887 (N.D. N.Y. 1978) even identifies a stream of commerce in realtors' referral fees. *United States v. Foley*, 1979-1 Trade Cases, ¶ 62577 comments upon the "transient nature of the market," because of its proximity to the District of Columbia.

<sup>87</sup> Pub. L. No. 93-533, 88 Stat. 437 (codified) at 12 U.S.C. Section 2601 FF.

<sup>88</sup> *Id.* (emphasis added).

<sup>89</sup> 12 U.S.C. Section 2602(3).

Congressional findings on the extent of charges for settlement services form part of the legislative history of the Act.<sup>90</sup>

Particularly relevant are data contained in the "Additional Remarks of Senator Proxmire" which accompany the Senate Committee Report.<sup>91</sup>

Senator Proxmire's figures are themselves based upon a 1971 joint report of the Department of Housing and Urban Development and the Veterans Administration (HUD-VA Report) which obtained data from 50,605 residential real estate transactions across the nation.<sup>92</sup>

Of the 50,000 plus transactions studied, over 31,000 or about 60% reported payment of a real estate commission "the balance being presumably sold by the owner or builder directly."<sup>93</sup>

For purposes of the report, "settlement charges" included: closing costs, realtors' commissions, points, statutory charges, and pre-paid items such as property taxes and fire insurance.<sup>94</sup>

<sup>90</sup> S. Re. (Banking, Housing and Urban Affairs Committee) No. 93-866, 93d Cong. 2d Sess. (1974), reprinted in (1974) *U.S. Code Cong. and Ad. News* 6546 FF.

<sup>91</sup> *Id.* at 6557 FF.

<sup>92</sup> *Id.* at 6561.

<sup>93</sup> *Id.* at 6562.

<sup>94</sup> *Id.*



Real Estate commissions formed the largest single element of the average transaction accounting, according to HUD-VA figures, for approximately 32% of the overall settlement figure.<sup>95</sup>

Taking the HUD-VA figures and projecting them to 1974 with allowance for conventional financing and increases in prices, Senator Proxmire provides data on the total settlement bill on the five million one and two family houses which are sold each year in the United States.<sup>96</sup> An examination of the table set forth in the

95 *Id.* The following figures are given:

AVERAGE CHARGE PER TRANSACTION BASED UPON 50,605 TRANSACTIONS		
ITEM	AVERAGE AMOUNT	PERCENT
Closing Charges	\$ 494.00	26%
Realtors' Commission	625.00	32%
Points	454.00	24%
Statutory Charges	65.00	3%
Prepaid Items	299.00	15%
	<u>\$1937.00</u>	<u>100%</u>

As mentioned realtors participated in 31,076 of the 50,605 transactions. The \$625.00 average figure however is averaged over all 50,605 transactions. According to the report, the average size of the commission on those transactions where one was paid was \$1019.00.

96 *Id.* at 6563. The data given are as follows:

ELEMENT OF CHARGE	Total Annual Charge Based On 5 Million Sales Per Year	
	Dollars (Billions)	Percent
Loan Origination fee	\$ 1.5	11%
Title Insurance	1.0	7%
Title Examination	.4	3%
Attorney fees	.6	4%
Other Closing Charges	.8	5%
Subtotal Closing Charges	\$ 4.3 (subtotal)	30% (subtotal)
Real Estate Commission	5.6	40%
Points	.7	5%
Prepaid items	2.8	20%
Statutory Charges	.6	5%
	<u>\$ 14.0</u>	<u>100%</u>

footnote indicates a total settlement bill at that time of fourteen billion dollars annually.

Again as in the original HUD-VA report realtors' commissions are the largest element, totaling 5.6 billion annually or 40% of the total 14 billion.<sup>97</sup> Interestingly, fees for title examinations are the smallest element of the overall charge amounting to less than 3% of this total.<sup>98</sup>

The conveyancing industry as a whole is traditionally non-competitive. The Real Estate Settlement Procedures Act, in addition to its disclosure requirements, outlawed kickbacks and rebates in that industry.<sup>99</sup> Ironically, in the absence of price competition these "under the table" activities, although rarely inuring "to the benefit of the home buyer," were virtually the only competitive forces at work in the industry.<sup>100</sup>

It is time for that to change.

### III

#### The Proper Functioning Of Any Given Local Market In Real Estate Depends Upon The

97 *Id.* The United States brief *amicus curiae* gives a figure of 15 billion in real estate commissions alone. Regardless of which figure is relied upon, the amounts of money involved are staggering.

98 *Id.*

99 12 U.S.C. Section 2607.

100 See: B. Owen, "Kickbacks, Specialization, Price Fixing and Efficiency in Residential Real Estate Markets" 29 *Stanford L. Rev.* 931 n. 4. (1977).

**Interstate Movement Of Resources, Particularly Loan Capital Into The Local Market. As A Matter Of Law And Practical Economics, Price Fixing Among Real Estate Brokers And Agents Substantially Affects The Local Real Estate Market And Thereby Affects The Interstate Movement Of Resources Upon Which The Local Market Depends.**

*A. The Difference between "In Commerce" and "Affectation of Commerce" Approaches to Antitrust Subject Matter Jurisdiction.*

Jurisdiction over local activities in restraint of trade may be reached under either the "in commerce" or the "affectation of commerce" approaches. Petitioners submit that significant conceptual differences exist between the two approaches. Under the "affectation theory" consummation of the local transactions must depend in a significant way upon consummation of the interstate activity; in an "in commerce" case, the opposite situation prevails. Also under an "in commerce" approach the dependence of the interstate activity upon the local activity is inevitably procedural and functional; while under the "affectation" theory, the dependence of the local activity upon the interstate activity is generally structural and economic.<sup>101</sup>

<sup>101</sup> The analysis may proceed along either "micro" or "macro" economic lines respectively.

In *Yellow Cab*,<sup>102</sup> an "in commerce" case, the Court said that a taxi ride between train stations in Chicago was *part* of an interstate journey.<sup>103</sup> Completion of the interstate journey was procedurally and functionally dependent upon the local, restrained activity. Nothing more needed to be shown. The economic impact of the two cab companies' agreement not to compete upon the interstate rail transportation of people was simply irrelevant. Similarly, in *Goldfarb*<sup>104</sup> when the title examination was declared to be an "integral part"<sup>105</sup> of obtaining the financing "an interstate transaction";<sup>106</sup> a consideration of the economic effects of the price fixing upon home prices became unimportant because: "(t)he fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected."<sup>107</sup> Of course it was affected: consummation of the loan — the interstate transaction — *depended* upon the local title examination. But just because title lawyers are sometimes like cab drivers does not mean that either of them are ever like realtors.

Jurisdiction over the realtors can be reached only under the "affectation doctrine." Just the opposite of "in

<sup>102</sup> *United States v. Yellow Cab*, 332 U.S. 218 (1947).

<sup>103</sup> (The taxi ride between two stations) . . . must be viewed in its relation to the entire journey. . . . So viewed it is an integral step in the interstate movement. *Id.* at 228-9.

<sup>104</sup> 421 U.S. 773.

<sup>105</sup> *Id.* at 784.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 785.



commerce," the "affectation theory" demands that the local transaction depend upon consummation of the interstate transaction. The interstate aspect must be shown to be an "integral part" of the local market somehow necessary to its successful operation or survival. If this relationship really exists and if it is not frivolous or trivial then local restraints that adversely affect the local market will also adversely affect any interstate movement of necessary resources into or out of the given local market.

For example, in *Burke v. Ford*<sup>108</sup> the local activities involved the wholesale and retail markets in liquor. No liquor is distilled in Oklahoma, therefore the entire *intrastate* liquor market depended upon the interstate movement of liquor into Oklahoma from sources outside. The Court found that horizontal territorial divisions among wholesalers reduced competition in the local market and thus hampered the interstate movement of liquor into Oklahoma because it resulted in fewer local sales and, "hence fewer purchases from out-of-state distillers — than would have occurred had free competition prevailed among the wholesalers." Interstate resources in liquor which would ordinarily enter a freely competitive Oklahoma liquor market were stifled. They may have been diverted to other states; they may not have been sold or even produced at

<sup>108</sup> 389 U.S. 320.

all, *but*, in any case, they did not flow across the state line into Oklahoma. That's a substantial effect.<sup>109</sup>

In two earlier cases, *Employing Plasters*<sup>110</sup> and *Employing Lathers*,<sup>111</sup> the Court found that local restraints in the building trades caused unreasonable burdens upon the interstate movement of building materials and related supplies into the respective affected area.<sup>112</sup>

The assumption that the operation of the locally restrained building trades depended upon the interstate movement of building supplies into the local Chicago market is implicit in these decisions.

In *United States v. Women's Sportswear Association*<sup>113</sup> the purely local restraint between jobbers and stitching contractors in Boston was susceptible to federal antitrust regulation because, "... the industry in Massachusetts subsists on a constant influx of cloth and outgo of garments. . ." <sup>114</sup> This case also has an "in commerce" aspect in that the interstate commerce in finish-

<sup>109</sup> And the fact that neither the perpetrator nor the victim was engaged in an interstate activity involving the restraint is also immaterial:

"If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Womens Sportswear Assn.*, 336 U.S. 460, 464.

<sup>110</sup> *United States v. Employing Plasters Ass'n.*, 347 U.S. 186 (1954).

<sup>111</sup> *United States v. Employing Lathers Ass'n.*, 347 U.S. 198 (1954).

<sup>112</sup> Chicago, Illinois.

<sup>113</sup> 336 U.S. 460.

<sup>114</sup> *Id.* at 462.

ed garments of the jobbers was dependent upon the local activity of the stitching contractors. However, continuance of the purely local activity of the stitching contractors did depend upon, and in turn, substantially affect the interstate movement of resources and finished products out of Boston.

Recently in *Hospital Bldg. Co. v. Rex Hospital Trustees*<sup>115</sup> the Court found jurisdiction over a conspiracy to block the local expansion of plaintiff's hospital. Factors of commerce involved the interstate purchase of medicines and supplies; the receipt by plaintiff of revenues from out of state hospitalization insurers, as well as the payment by plaintiff of management fees to its out of state parent corporation.<sup>116</sup> What's more:

... the multimillion dollar financing for the expansion, a large portion of which would be from out of state would simply not take place if the respondents succeed in their alleged scheme.<sup>117</sup>

Here a local hospital was shown to be dependent upon the interstate movement of resources, namely: money, medicines and supplies, a movement that would be stifled or impaired if the expansion was blocked.

<sup>115</sup> 425 U.S. 738 (1976).

<sup>116</sup> *Id.* at 744.

<sup>117</sup> *Id.*

Before moving on, petitioners would comment briefly upon *Mandeville Island Farms v. American Crystal Sugar Co.*,<sup>118</sup> the first affectation case. The case involved two separate markets: one local, one interstate. The local market was in sugar beets; the interstate market in refined sugar. The beets never entered the stream of commerce; however, as the court noted, the price paid for the beets was based upon the price obtained for the sugar. Since the fixed price of beets in the local market was a relevant variable in the interstate market in sugar, an effect upon interstate commerce might well have been presumed. In any case, the local commerce in sugar beets depended for its existence upon the movement of refined sugar out of California and into channels of interstate commerce.<sup>119</sup>

The characteristic pattern in "affectation" cases then is a showing that the local market is dependent for its operation upon identifiable streams of interstate commerce, and that if a restraint affects the local market in such a way as to divert, alter, impair or burden the unfettered interstate flow of resources into or out of the local market, Sherman jurisdiction exists.

B. *The Relationship of Real Estate Brokerage and of Interstate Commerce to the Survival and Functioning of Local Real Estate Markets.*

<sup>118</sup> 334 U.S. 219 (1948).

<sup>119</sup> *Id.* at 242.



Petitioners respectfully submit that the activities of realtors are necessary to the survival and proper functioning of local real estate markets.

Petitioners have shown that the survival and proper functioning of local real estate markets also depend upon resources such as money that flow through channels of interstate commerce into and out of the local market.

Consider the function of the realtor:

The role of the realtor<sup>120</sup> in the typical buy/sell transaction includes the following:

1. Obtaining a listing from a potential seller;
2. Locating a potential buyer from multiple listing services, through advertising, national relocation services, etc.;
3. Confecting a purchase agreement usually contingent upon the buyer obtaining financing;
4. Accepting and acting as escrow agent for the earnest money deposit;
5. Often providing assistance and logistical

<sup>120</sup> In a given transaction there may be more than one realtor, a "listing" agent who represents the seller, and a buyer agent. In such cases the commission would be split between the agents.

support in moving the transaction toward the act of sale.<sup>121</sup>

6. Attending the Act of Sale;
7. Accounting for deposits held in escrow, and
8. Collecting at the act of sale a commission equal to six percent or more of the purchase price of the home.<sup>122</sup>

Further, and in a more general sense, realtors, by bringing together buyer and seller and by assisting in the consummation of the transaction, actually "make" the local market in realty. Other than direct sales of a new construction by builders and sheriffs' sales, real estate brokerage is the only regular commercial channel for the marketing of residential property. Realtors, "provide information about the housing market to buyers and sellers who have no other source of expert knowledge about conditions in that market."<sup>123</sup> As one real estate textbook puts it:

Brokerage is the largest single specialty of real estate business other than construction and development. Brokerage is also the most visible specialty in real estate because brokers ad-

<sup>121</sup> E.g. obtaining appraisals, securing documents, acting as liaison between the parties, the homestead, the lawyers, etc.

<sup>122</sup> McLain Pet. pp. 11-12.

<sup>123</sup> Cf. B. Owens, "Kickbacks, Specialization Price Fixing and Efficiency in the Residential Real Estate Market." 29 *Stanford L. Rev.* 931.

vertise widely and sales people move freely among the population in search of transactions. . . . Professional know-how is really the product being sold.<sup>124</sup>

In short, realtors "merchandise" homes.<sup>125</sup> If they did not exist, they would have to be invented, or the real estate market would cease to function on a continuing and viable basis.

With respect to the interstate aspects, petitioners contend that financing and title insurance are also necessary to the survival and proper functioning of the local real estate markets. Government data indicate that debt-financing plays a role in nearly 90% of all sales of housing, and statistics show that the total national mortgage debt exceeds 650 billion dollars, nearly a fourth of which (141.7 billion) is guaranteed by one federal agency or another.<sup>126</sup>

Petitioners have previously discussed the significant amounts of interstate commerce involved in the financing, title insurance and loan guarantee aspects of real estate transactions in New Orleans and throughout the United States.<sup>127</sup>

<sup>124</sup> J. Dasso et al., *Fundamentals of Real Estate* (Englewood Cliffs, N.J.: Prentice Hall, Inc., 1977) 27-8.

<sup>125</sup> This expression was used by the deponent, Mr. A. T. Post, whose deposition unfortunately was not filed.

<sup>126</sup> See the figures and sources cited in the United States brief, *amicus curiae*, p. 10, n. 14.

<sup>127</sup> See text, *supra*, at n. 54-82.

Petitioners now submit that the survival and viability of the local real estate market is economically dependent upon the continuing interstate flow of such resources as loan capital, title insurance, etc. into the local market. Additionally, as previously mentioned, to the extent that primary loan capital is obtained through the resale of notes in the secondary market — an interstate market — the local real estate transaction may be likened to a manufacturing process in which are created valuable articles of interstate commerce necessary to maintain the streams of home new loan funds back into the local market and other local markets in order that subsequent transactions may occur and local markets may thereby sustain themselves.<sup>128</sup>

In summary, the local real estate market is dependent upon both the activities of realtors, and upon the interstate inflow and outgo of resources, particularly money and negotiable paper.

Positing this market dependence upon both local and interstate functions, it remains only to be shown that a restraint operating in the local market activity, as a matter of law and practical economics, has a substantial effect upon those interstate activities upon which the market also depends.

<sup>128</sup> See text, *supra*, at 63-64. Pledging notes to secure future advances of loan capital is another activity in which the closing can be likened to a manufacturing process.



Such a showing will satisfy the "affectation" doctrine.

C. *The Substantial Effect of Price Fixing of Realtors' Commissions On the Interstate Activities Upon Which the Local Real Estate Market Depends.*

"Affectation of commerce" requires that local restrained activity exert a "substantial effect" upon identifiable streams of interstate commerce upon which the local market depends. If the local market does not require or demand that interstate activity attend its proper functioning, or if the local restraint bears no significant relationship to the interstate aspects upon which the local market depends, then there is no jurisdiction.<sup>129</sup>

<sup>129</sup> Such situations are difficult to imagine. See for example: *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir. 1975), a bid rigging case involving local contractors for municipal contracts.

Upholding jurisdiction the court remarks:

... where bids are rigged, the price the city will have to pay for the project is artificially increased ... in two ways...

First, funds for the project come from H.U.D. and its appropriation to the city had to be increased. ... H.U.D. funds are transferred in interstate commerce, an increase in the amount of money required for this project would inevitably mean that there would be less money available for H.U.D. projects elsewhere in the United States.

Second, where the city must use more of its available funds to complete the project, it will have less money to expend for other projects requiring the use of goods shipped in interstate commerce.

An example that might satisfy one or the other aspects of the situation in the text is *Save Our Cemeteries, Inc. v. Archdiocese of New*

In applying the affectation doctrine, the "soft word" is "substantial." It serves as a way of stating rather than of reaching the conclusion that an activity exerts a sufficient effect upon interstate commerce to justify federal regulation.<sup>130</sup>

Decisions of this Court have continually expanded the jurisdictional scope of the Sherman Act to correspond with "expanding motion of congressional power. . . ." <sup>131</sup> under the Commerce Clause.

So too the criteria of substantiality, always a question of degree,<sup>132</sup> have from time to time been re-examined by the Court.

The Court most recently re-considered the matter in the *Hospital Bldg.* case,<sup>133</sup> the facts of which have previously been stated.<sup>134</sup>

*Orleans*, 568 F.2d 1074, (5th Cir. 1978) (Old cemetery, municipal ordinance: no more burials).

In any event, as the Seventh Circuit held, in *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n*, 484 F.2d 751, 759, (1973):

Dismissal . . . (on pleadings and affidavits) . . . should be granted only when the relation of the subject to interstate commerce is clearly nonexistent.

A sentiment with which petitioners heartily agree.

<sup>130</sup> Cf. *Wickard v. Filburn*, 317 U.S. 111, 122 (1942).

<sup>131</sup> *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 743 n. 2 (1976).

<sup>132</sup> *Santa Cruz Co. v. Labor Bd.*, 303 U.S. 453, 466-7 (1938).

<sup>133</sup> *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738.

<sup>134</sup> See text, *supra*, at note 115.

There, the Court through Mr. Justice Marshall, unanimously held that:

An effect can be 'substantial' under the Sherman Act even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market prices.<sup>135</sup>

The Court went on to define a "substantial effect" as an "unreasonable burden on the uninterrupted flow of interstate commerce, . . ." <sup>136</sup>

Petitioners will advance two contentions in favor of jurisdiction under the "substantial effect" or "unreasonable burden" approach.

<sup>135</sup> 425 U.S. 738, 745

<sup>136</sup> *Id.* The Court further stated that:

" . . . a complaint should not be dismissed unless it appears that the plaintiff can prove *no set of facts* in support of his claim that would entitle him to relief" (*Id.* citing *Conley v. Gibson*, 355 U.S. 41, 45 (1957)).

Actually whether it is expressed in terms of "substantial effect" or "unreasonable burden" the activity of finding jurisdiction is result oriented. The real question is whether federal regulation of a particular activity is an "appropriate means" to the attainment of . . . the effective execution of the granted power to regulate interstate commerce" *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (citations omitted). The answer would seem to depend upon whether given an interstate commerce nexus of any degree at all, there is a valid federal interest in promoting the activity which suffers from the restraint — in this case, a Federal interest in seeing that local housing markets become more perfectly competitive. In that respect, the Fifth Circuit's invocation of, "the growing spirit of federalism manifested at all levels of judicial and legislative decision making. . ." (See *McLain Pet.* p. 41a) is unpersuasive in that there is no state or local policy adverse to federal antitrust regulation of realtors.

The first is derived from the *per se* nature of price fixing in substantive anti-trust law;<sup>137</sup> the second is a matter of logic and practical economics.

Simply stated, price fixing is a naked restraint of trade that carries with it a conclusive presumption of an adverse effect upon the relevant market.<sup>138</sup>

The relevant market would be any market in which the "fixed price" is a relevant price.

Assuming the truth of the allegations of petitioners' complaint related to price fixing, the *per se* rule supplies a conclusive substantive presumption of an adverse effect in the local real estate market.

Jurisdictionally this avails petitioners nothing, since by definition a real estate market is a local market. But, the local real estate market is not the only market in which the fixed price is relevant. Petitioners submit that if the price of the house is an economically rele-

<sup>137</sup> *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 224 n. 59.

<sup>138</sup> *Id.* and see *McLain Pet.* p. 9a:

"The aforesaid combination and conspiracy consist of a continuing agreement and concert of action between the defendants to fix, control, raise and stabilize prices for the purchase and sale of real estate in a knowing arbitrary, unreasonable and unlawful way. (emphasis added)"

In the absence of evidence or even discovery in this substantive area, this ultimate fact allegation should be taken as true. Actually it was controverted by denial in the case of only two of the named realtor defendants, who were the only parties to file answers. A. 7-14.



vant variable in some identifiable and related interstate market, then the *per se* rule with its conclusive presumption of adverse effect will carry over into that market as well.<sup>139</sup>

That the price of the home is a relevant variable in determining the amount financed is a matter of simple logic. The buyer has two sources from which he derives the money to buy his home: his own pocket and the homestead. The down payment plus the amount financed equal the price of the house. Whether home prices were affected by the fixed commission or whether they were freely competitive, the buyer in any single instance would probably have the same amount of money to use as a down payment, namely: as much as he can afford. The difference then between home prices affected by realtors' price fixing, and home prices determined by freely competitive market factors would *have* to be reflected in the amount financed, because that is the *only* area in which the slack can be taken up. It is the only fairly readily changing variable.

What's more, if home prices are increased by price fixing of realtors' commissions — which they have to be unless it's the seller who absorbs the reduction in proceeds occasioned by the commission and thereby becomes the injured party — then over-all market patterns will be altered and some buyers will be driven

<sup>139</sup> For example it might have been applied in *Mandeville Island Farms* where the local price of beets was related to the interstate price of sugar. See text at note 118, *supra*.

out of the market because of their simple inability to put down enough cash to equal the difference between the artificially inflated price of the house and 80% of the appraised value which is about the limit of a conventional financing in most New Orleans transactions.

Petitioners have already suggested in their original writ application<sup>140</sup> that since the realtor's six percent comes "off the top" at the time of the act of sale, then assuming no realtor and no 6 percent, "the buyer would obtain an additional six percent equity in his new home by virtue of his original down payment",<sup>141</sup> and would therefore finance less.

So it seems fair to conclude that the price of the house is a primary determinant of the amount financed. The amount financed ordinarily determines the amount of title insurance which the lender will require on its commitment. *Both of these markets are interstate markets and in both of these markets the price of the home is a relevant variable.* Assuming that home prices are affected through price fixing by realtors, then petitioners submit that the *per se* rule provides a conclusive presumption of an adverse effect carried over into the interstate home financing market, the title insurance

<sup>140</sup> Cf *McLain Pet.*, p. 14.

<sup>141</sup> *Id.*

market, the secondary market, etc., and jurisdiction is thereby established.

Petitioners would close their brief with their second contention that the six percent commission is in itself quantitatively substantial.

Assuming that the seller will raise his price to pass on the realtor's commission, the buyer must finance more of the purchase price and then amortize it with interest. Over a 30 year period at 9½ percent per annum interest, for every dollar borrowed three dollars are repaid.<sup>142</sup> Thus in amortizing the six percent commission, the buyer eventually repays, over the life of the loan, an amount equal to roughly 18% of the price of his home.

Even supposing he doesn't keep the home for thirty years, he must re-enter the market as a seller and the six percent that he is charged when *he* becomes a seller — unless it can be passed on to the next buyer — will eat into any margin of profit that he may derive from the sale. Either way as buyer or as seller or as homeowner making his monthly payments in between, he feels the "pinch", and so does interstate commerce.

### CONCLUSION

For the abovegoing reasons, petitioners respectfully pray that the judgments of the United States District

<sup>142</sup> Cf. *McLain Pet.*, p. 13.

Court for the Eastern District of Louisiana, and that of the United States Court of Appeals for the Fifth Circuit be reversed, and that this matter be remanded for further proceedings.

Respectfully submitted,

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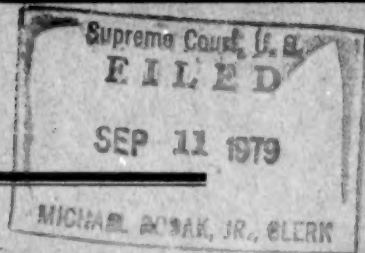
### CERTIFICATE

I certify that on the \_\_\_\_ day of July, 1979, three copies of the foregoing Brief for the Petitioners were hand delivered by undersigned counsel to Mr. Harry McCall, lead counsel for Respondents. I further certify that all parties required to be served have been served.

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RICHARD G. VINET





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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

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**No. 78-1501**

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JAMES JEFFERSON McLAIN, ET AL., *Petitioners,*

v.

REAL ESTATE BOARD OF NEW ORLEANS, ET AL.,  
*Respondents.*

---

On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

---

**BRIEF FOR THE RESPONDENT  
LATTER & BLUM, INC.**

---

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On Writ of Certiorari to the United States  
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**BRIEF FOR THE RESPONDENT  
LATTER & BLUM, INC.**

---

**QUESTIONS PRESENTED**

Petitioners McLain *et al.* (hereinafter "plaintiffs"), and the United States as amicus curiae (hereinafter "the government"), contend that this case involves the sweeping question of whether real estate brokerage services, in general, throughout the United States, are subject to the Sherman Act. They ask the Court to presume the existence of a substantial effect on interstate commerce. The government has even gone so far



as to suggest (at 13) that the issue of whether the actual activities of the respondents involved in this case "affected commerce in a particular fashion is irrelevant," and that Sherman Act interstate commerce questions "should not be the subject of a trial." No authority is cited for this proposition and there is none.

Respondent Latter & Blum is a realtor licensed only in Louisiana and doing business only in Louisiana. Like the other realtor-respondents, Latter & Blum is concerned that this case be considered in the context of its particular facts, the same way in which this Court has considered every single Sherman Act interstate commerce case it has ever decided, and that this case not be used as the vehicle for wholesale "federalization" of local business. Accordingly, the questions presented for review here are as follows:

1. Whether the district court's finding, based on uncontradicted evidence, affirmed by the court of appeals, that New Orleans real estate brokerage services do not substantially affect interstate commerce, is clearly erroneous.
2. Whether a substantial effect on interstate commerce can be presumed based on the fact that some real estate purchases are financed and insured by firms involved in interstate commerce, even where New Orleans real estate brokers play no substantial, let alone integral, part in the securing of such financing or insurance.
3. Whether a substantial effect on interstate commerce can be presumed from the fact that price fixing has been held a *per se* antitrust violation, even where the particular practices complained of in this case do not substantially affect interstate commerce.

## STATEMENT OF THE CASE

On October 31, 1975, plaintiffs, on their own behalf, and purportedly on behalf of all buyers and sellers of residential real estate in the New Orleans area, charged defendant real estate brokers with fixing the price of real estate brokerage services for the sale of residential real estate in the Jefferson and Orleans Parishes of Louisiana. (McLain Pet. App. 1a-16a) Defendants moved to dismiss the complaint on the grounds of lack of subject matter jurisdiction. (A. 18) After extensive briefing, the district court ordered discovery on the jurisdictional issues. (A. 80) Plaintiffs deposed and discovered documents from nine witnesses including government officials, real estate brokers, mortgage lenders and real estate title insurers. (A. 80-96, 108-116) After reviewing the record evidence adduced by plaintiffs, the district court reached the "inescapable conclusion" that the activities of the defendant brokers had only an incidental rather than substantial relationship to interstate commerce and, therefore, granted the motion to dismiss. (McLain Pet. App. 17a-23a) A unanimous Fifth Circuit panel affirmed, agreeing that the brokers had only an incidental effect on interstate commerce. The evidence supporting that conclusion, the court observed, was "essentially uncontradicted." (McLain Pet. App. 24a-43a) This Court granted plaintiffs' petition for certiorari on May 4, 1979.

## SUMMARY OF ARGUMENT

### I

Plaintiffs and the government contend that this case involves the issue of whether real estate markets, in general, across the nation, substantially affect inter-

state commerce. They contend that if any aspect of the real estate industry anywhere in the nation affects interstate commerce, then every aspect does. This is a radical departure from traditional doctrine and fundamentally misconstrues this Court's prior Sherman Act interstate commerce opinions that have solely focused upon the particular facts of each case. The Court has repeatedly rejected adopting the kind of general sweeping rules plaintiffs and the government advocate here.

## II

After reviewing the extensive record created by plaintiffs, the district court came to the "inescapable conclusion" that defendants' brokerage services do not substantially affect interstate commerce. The court of appeals found the evidence supporting this conclusion "essentially uncontradicted." This evidence shows simply that the brokerage function is essentially completed when buyer meets seller. After that point, the broker plays no more than an informational, incidental role, at most, in the process by which the buyer secures any financing or title insurance. The district court's factual findings cannot be overturned unless "clearly erroneous," and there is no error here. Moreover, the conclusion that no substantial interstate commerce is affected is fully consistent with this Court's prior decisions.

## III

Faced with an adverse factual record of their own creation, plaintiffs effectively wish the record away and ask that a substantial effect on interstate commerce be presumed. Based on the facts of this case, such a

presumption would not only be wholly inappropriate, but also fundamentally inconsistent with the prior, intensely fact-oriented, decisions of this Court. Making the argument for the first time, plaintiffs ask this Court to hold that brokerage fees, which are paid by the homeseller, are presumptively passed-on to the homebuyer in the form of higher home prices, which in turn affect the interstate flow of money. This passing-on hypothesis was not presented to the lower courts, is totally unsupported in the record, and squarely conflicts with this Court's recent decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which held the passing-on theory so economically speculative it had no place in antitrust jurisprudence.

## IV

Plaintiffs ask this Court conclusively to presume a substantial effect on interstate commerce merely because they have alleged a *per se* antitrust violation. This theory has never been adopted by a single court. Moreover, by sweeping into the federal domain literally thousands of practices previously of exclusive state concern, plaintiffs' theory would significantly change the federal-state balance with no discernible justification.

## ARGUMENT

### I. The Court's Inquiry Should Focus Upon The Particular Facts Of This Case And Not, As Plaintiffs And The Government Contend, Upon Real Estate Markets In General

The defendants have been charged with fixing the commission rate for brokerage services in connection with the sale of residential real estate located in the



Orleans and Jefferson Parishes of Louisiana. Rather than attempting to show that defendants' specific activities in these two Louisiana parishes have substantially affected interstate commerce, plaintiffs and the government have devoted the bulk of their briefs to discussing real estate markets in general and to statistics showing the amount of money involved in real estate financing nationally. Plaintiffs (at 36) have asked the Court to formulate "a general theory of interstate involvement in local real estate markets." The government (at 13) has gone even further and suggested that whether or not the specific activities of the defendants in this case have affected interstate commerce is "irrelevant." It even argues (*id.*) that Sherman Act interstate commerce questions "ordinarily should not be the subject of a trial."

Latter & Blum is a local concern which has great difficulty in assimilating what the plaintiffs' "general theory" is, unless it means that every local realtor, everywhere in the United States, should be federalized. Still, coming from a handful of local plaintiffs who are within an eyelash of being out of court, such an extreme position is as understandable as it is wrong. The government's move to federalize realtors, however, can only be premised upon an unprecedented view that the Sherman Act does not concern itself with the nature of the alleged restraint, nor with the identity of the alleged restrainer, but rather with some generalized nonspecific notion of the business or profession in which the defendant happens to earn his living.

These contentions, however, fundamentally misconceive the proper nature of the inquiry here.

In its prior Sherman Act interstate commerce decisions, this Court has repeatedly rejected the adoption of sweeping general rules, and has instead focused specifically upon whether the particular acts alleged in each case substantially affected interstate commerce.

In *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974), for example, where the plaintiff unsuccessfully sought to show an interstate commerce nexus with a conspiracy among producers of asphalt used in interstate highway construction, this Court held:

The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions. [419 U.S. at 202]

In finding plaintiff's proof insufficient, the Court indicated its decision was based solely on the facts of the case before it:

The District Court concluded on the basis of the record before it, that petitioners alleged antitrust violations had no 'substantial effect on interstate commerce.' There may be circumstances in which activities, like those of defendants Sully-Miller and Industrial would have such effects on commerce. On the record in this case, however, the conclusion of the District Court that no such circumstances existed here cannot be considered erroneous. [419 U.S. at 202-03]

Similarly, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), in holding that legal fees for title examinations in Fairfax County, Virginia, substantially affected interstate commerce, the Court explicitly

confined its decision to the specific facts before it rather than discussing legal services in general:

[T]here may be legal services that involve interstate commerce in other fashions, just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act. [421 U.S. at 785-86]

Moreover, contrary to the assertions of plaintiffs, the Court in *Goldfarb* did not hold that transactions in land generally affect interstate commerce. Instead, the Court simply held that where legal services were essential to the making of an interstate loan, those services affect interstate commerce. For purposes of the Court's analysis, however, it was irrelevant that the loan proceeds were used to purchase realty.

In *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), the Supreme Court likewise rejected the government's urging of a general rule concerning all taxicabs, and instead, carefully scrutinized the particular facts of the case and held that some taxi services were interstate while others were not.<sup>1</sup>

<sup>1</sup> The lower court decisions concerning the relationship between brokerage services and interstate commerce have similarly focused upon the specific facts of each particular case. In *U.S. v. Foley*, — F.2d —, 1979-1 Trade Cases ¶ 62,577 (4th Cir. 1979), *per cert.* pending, No. 78-1737 and 78-1838, for example, the court noted:

[T]he results in particular cases . . . have turned, quite appropriately, on their peculiar facts rather than on legal standards generally applicable to particular categories of business, professional or trade activities. (¶ 62,577 at 77,321)

As the court of appeals said in the case at bar, the different conclusions reached by the lower courts "result in part from the varying factual gradations alleged." *McLain v. Real Estate Board of New Orleans, Inc.*, 583 F.2d 1315, 1320 (5th Cir. 1978). The

Ignoring this Court's consistent focus on the specific restraint alleged in each case, however, the government contends throughout its brief that if *any* aspect of the real estate business, *anywhere* in the nation, affects interstate commerce, then *every* aspect of the real estate business must be considered to affect commerce. In support of this radical departure from traditional Sherman Act doctrine, the government relies upon some totally inapposite cases upholding the constitutionality of federal statutes regulating certain intrastate activities that, viewed in the aggregate, exacerbated some interstate, national problem.<sup>2</sup>

Challenges to the constitutionality of a statute, however, are decided in a completely different context from questions of interstate commerce involvement in Sherman Act cases. Federal statutes are presumed constitutional "until the contrary is shown beyond a rational doubt." *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90-91 (1958). Here, to the contrary, where the District Court could find no substantial effect on interstate commerce on the basis of uncontradicted evidence gathered and proffered at plaintiffs' behest, its findings must be accepted unless "clearly erroneous." *United States v. Oregon State Medical Society*, 343 U.S. 326, 338-39 (1952). Moreover, in *Gulf Oil Corp.*, *supra*, this Court held that its

court also held, correctly defendants contend, that the "polestar for analysis" (*id.*) is the specific factual context of each particular case.

<sup>2</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding statute regulating wheat production even as applied to wheat consumed on farm where grown); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding anti-discrimination law even as applied to small family-owned restaurant).



Commerce Clause review of federal statutes specifically regulating a particular line of business was significantly different from its review of interstate commerce questions arising under general statutes like the Sherman Act:

The jurisdictional inquiry under general prohibitions like . . . § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore, require federal regulation. Compare *United States v. Yellow Cab Co.*, 332 U.S. 218, 232-33 (1947), with e.g., *Perez v. United States*, 402 U.S. 146 (1971); *Maryland v. Wirtz*, 392 U.S. 183 (1968); and *Katzenbach v. McClung*, 379 U.S. 294 (1964). [419 U.S. at 197 n. 12]

*Accord: United States v. Darby*, 312 U.S. 100, 120-21 (1941). Thus, in holding that Sherman Act interstate commerce questions turn on the "circumstances presented in each case," this Court has rejected the identical argument pressed by the government here.

Congress has passed no statute regulating real estate brokerage fees. Plaintiffs cite the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et. seq.* (1976), which requires uniform disclosure of settlement charges, including broker's fees. However, the final Senate Report on the Act specifically stated that a proposed amendment to regulate the level of settlement charges was rejected as beyond Congress's power and an infringement upon the power of states:

Federal authority to establish rates for settlement charges would infringe on an area that has historically been of State and local concern. . . .

S. Rep. No. 93-866, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6546, 6550. Thus, far from indicating a Congressional assertion of sweeping federal power over real estate transactions in general, or the specific activity alleged in this case—fixing the level of brokerage fees—the only relevant expression of legislative opinion reflects Congress's view that its authority in this area is quite limited.<sup>3</sup> Indeed, this legislative history points 180 degrees away from the "Congressional intent" plaintiffs seek to infer.

Under the prior decisions of this Court, therefore, the only issue involved here is whether plaintiffs proved that the specific alleged unlawful practices of the particular defendants in this case, real estate brokers in the Orleans and Jefferson Parishes of Louisiana, substantially affected interstate commerce.

## II. Based On The Facts Of This Case The District Court Properly Found No Substantial Effect On Interstate Commerce

The requisite interstate commerce nexus may only be found where plaintiffs prove that the activities challenged as unlawful under the Sherman Act are either

<sup>3</sup> Based upon a similar Congressional doubt, revealed in the legislative history, about federal power over intrastate affairs, this Court in *United States v. Bass*, 404 U.S. 336 (1971), held that the Omnibus Crime Control and Safe Streets Act of 1968 only prohibited firearm possession by convicted felons where an interstate commerce nexus could be shown: "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." [404 U.S. at 349] *See also, Scarborough v. United States*, 431 U.S. 563, 575 (1977), where the Court commented on *Bass*: "There was some [Congressional] concern about the constitutionality of such a statute. It was that observed ambivalence that made us unwilling in *Bass* to find the clear intent necessary to conclude that Congress meant to dispense with the nexus requirement entirely."

"in interstate commerce" or "substantially affect interstate commerce." Plaintiffs have abandoned (at 13) the theory argued below that defendants activities are in commerce, and now exclusively place their hopes on the affecting commerce theory. The particular streams of interstate commerce which plaintiffs theorize (at 48-49) are substantially affected by defendants are "the financing, title insurance and loan guarantee aspects of real estate transactions in New Orleans and throughout the United States."<sup>4</sup> After extensive discovery,<sup>5</sup> however, plaintiffs were utterly unable to substantiate this theory. As held by the district court:

[T]he inescapable conclusion to be drawn from the evidence is that the participation of the broker in these (presumably interstate) phases of the real estate transaction is an incidental rather than indispensable occurrence in the chain of events.

<sup>4</sup> In identifying these streams of interstate commerce, plaintiffs have properly conceded (at 26 n. 53, and 35) that the mere movement of people across state lines is "not sufficient" to establish a substantial effect on interstate commerce. Accordingly, plaintiffs have staked their case on other factors.

<sup>5</sup> Plaintiffs noticed and took nine depositions, and subpoenaed documents from the deponents. While plaintiffs now appear to complain that discovery was incomplete because certain interrogatories were not answered, they have no one to blame but themselves. The district court authorized discovery on jurisdictional issues on September 3, 1976, but plaintiffs' interrogatories were not served until more than three months later, on December 22, 1976, only nine days prior to the close of discovery. Moreover, while the interrogatories to defendants were not answered, plaintiffs' depositions covered most of the same territory. Plaintiffs, quite understandably, fail to suggest what better results they hoped to obtain with their eleventh hour interrogatories than they obtained with their nine hand-picked depositions.

*McLain v. Real Estate Board of New Orleans*, 432 F. Supp. 982, 985 (E.D. La. 1977). This finding by the District Court cannot be overturned unless "clearly erroneous." *United States v. Oregon State Medical Society*, 343 U.S. 326, 338-39 (1952). Not only is there no such clear error here, the evidence in the record supporting this finding is, as held by the court of appeals, "essentially uncontradicted." [583 F. 2d at 1372]

The extensive record reveals the following critical and uncontroverted facts: All the defendant real estate brokers are located in Louisiana, and are charged solely with fixing brokerage service prices for the sale of Louisiana real estate. (Complaint, *McLain* Pet. App. 1a-16a). Defendants' brokers licenses, issued by the state of Louisiana, permit sales only in Louisiana. (A. 271) The brokerage function is limited to bringing buyer and seller together and is essentially completed at that time. (432 F. Supp. at 985, A. 41, 43-44) There is no legal or practical necessity for utilizing a broker's services to sell residential real estate. (A. 41, 43) Brokers "play no part at all" in the lender's decision whether to approve a loan for a prospective purchaser. (A. 145-46) Brokers play no part at all in an insurer's decision whether to issue a title insurance policy. (A. 151) Brokers play no part at all in the federal government's decision whether to guarantee a loan. (432 F. Supp. at 985 n. 4) Brokers occasionally refer prospective purchasers to particular lending institutions, but their role is strictly informational. In at least 60-70 percent of the cases, the buyers contact the lender on their own or through referrals from friends and relatives. (A. 145-46, 198) The broker plays no part in the completion of the real estate transaction at closing. (A. 287)



Based on these facts, the District Court could only have found a lack of substantial effect on interstate commerce. This conclusion, moreover, is fully consistent with the prior decisions of this Court.

In *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950), a suit charging District of Columbia realtors with price fixing, the Court's opinion stated: "The fact that no interstate commerce is involved is not a barrier to the suit." [*Id.* at 488] While this statement is dictum because the District of Columbia's special status eliminated any interstate commerce requirement under the Sherman Act, the activity commented upon—real estate brokerage services within a single jurisdiction—is precisely what is involved in the case at bar.

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the rationale that led the Court to find that lawyers' title examination services substantially affected interstate commerce, points to just the opposite conclusion here. The opinion stressed that the interstate legal services were "essential," "integral," "inseparable" elements of interstate loan transactions because without them, the lender could not grant a loan. [*Id.* at 784-85] Here, to the contrary, the uncontradicted record evidence shows that brokers play no role whatever in a lender's decision to grant a loan. As one lender responded to a deposition question put by plaintiffs' attorney:

[W]e do not underwrite our loans on what the real estate agent does. It is of no importance to us what the real estate agent thinks. (A. 135)

He further stated that the broker was basically a nuisance when a purchaser comes in to discuss a loan:

You prefer them (brokers) not to sit there, because, frankly, making a loan is none of their business, the real estate agent. I don't mean that to be derogatory. It is not the agent's job. We do the underwriting and make the loans and approve the loans, not the agents. (A. 137-38)

This Court's decision in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), also supports the District Court's conclusion that an incidental effect on interstate commerce is insufficient to meet the Sherman Act's interstate commerce requirement. The Court held that taxicab service for interstate travelers between train stations in Chicago was "part of the stream of interstate commerce," but that a conspiracy affecting otherwise local taxicab service did not involve interstate commerce. The parallels between the local cab service in *Yellow Cab* and the brokerage services involved here are striking. The Court commented that the cabs crossed no state lines and were limited by ordinance to trips within the city of Chicago. The Court said that even where the cab happened to transport a passenger from his home to a train station for an interstate trip, no interstate commerce was involved since "to the taxicab driver, it is just another fare." [332 U.S. at 232] Moreover, the Court commented that taxi service was just one of many ways a traveler could get to the station.

Similarly, here, the defendant real estate brokers are limited by their licenses to selling only Louisiana real estate. Additionally, once the broker completes his function of bringing together buyer and seller it is irrele-

vant to him whether the buyer pays cash for the house, assumes an existing mortgage, or secures a loan from a firm that in turn operates in interstate commerce. To a broker, each sale is "just another commission." Moreover, as one lender aptly put it, when a broker refers a prospective purchaser, the broker is simply "a good taxicab to bring him down." (A. 137) And, as the lender also said, 60-70 percent of the time the broker has nothing to do with the referral—the purchaser comes on his own. (A. 146)

Thus, *National Association of Real Estate Boards*, *Goldfarb*, and *Yellow Cab Co.*, *supra*, all support the conclusion that defendants' real estate brokerage services do not substantially affect interstate commerce. The various cases relied upon by plaintiffs, where this Court found the interstate commerce requirement satisfied, all involved defendants who themselves were engaged in interstate commerce, or alleged conspiracies whose targets were firms engaged in interstate commerce. Neither factor is present here.

In *Burke v. Ford*, 389 U.S. 322 (1967), and *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), for example, the defendants themselves were engaged in the interstate purchase or sale of liquor and sugar, respectively. The Court had no trouble concluding that the intrastate activities of these firms—procurement of raw material and intrastate distribution of goods shipped interstate—were essential, integral parts of their own interstate activities. Similarly, in *United States v. Employing Plasterers Association*, 347 U.S. 186 (1954), *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976), and *United States v. Women's Sportswear Manufacturer's Association*, 336 U.S. 460 (1949), the target of each

alleged conspiracy was a firm engaged in interstate commerce. In *Plasterers*, the defendants allegedly conspired to prevent out of state contractors from selling in Chicago. In *Rex Hospital*, the defendants allegedly conspired to prevent the expansion of a competing hospital that was substantially engaged in interstate commerce. In *Women's Sportswear*, the defendants allegedly threatened to boycott, and thus, put out of business, firms that engaged in interstate commerce.

Unlike these cases, however, the real estate broker defendants here are far removed from, and completely independent of, any interstate commerce. Plaintiffs (at 13) have conceded that the brokers are not in commerce. Moreover, as found by the district court, the uncontradicted evidence establishes that the broker's relationship with the firms plaintiffs allege *are* in interstate commerce—lenders and insurers—is only incidental at most. Thus, because plaintiffs have simply failed to prove any facts indicating that brokerage services substantially affect interstate commerce, the dismissal of their complaint should be affirmed.

### III. A Substantial Effect On Interstate Commerce Cannot Be Presumed Merely Because Some New Orleans Real Estate May Be Financed Or Insured By Firms Engaged In Interstate Commerce

#### A. Brokerage services do not presumptively affect interstate commerce

Faced with essentially uncontradicted evidence that New Orleans brokers' services do not in fact substantially affect interstate commerce, plaintiffs argue (at 27) that the volume of interstate realty lending and insuring is so great this Court should simply presume such an effect as a matter of law. As discussed above, however, this Court has uniformly held that interstate



commerce questions turn on the particular facts in each case, and there is no evidence here that brokers play any more than an incidental informational role in the realty lending and insuring process.

Moreover, in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974), the Court rejected an argument virtually identical to the argument plaintiffs make here, and held that proof of interstate commerce must be based on facts, not on presumptions. The defendants in *Gulf Oil* were manufacturers of asphaltic concrete used for intrastate repair and construction of interstate highways. They were charged, among other things, with tying the sale of the asphalt to sales of other commodities and to the receipt of loans on favorable terms, in violation of § 3 of the Clayton Act. Because interstate highways were involved, just as plaintiffs contend interstate lending is involved here, the Ninth Circuit found the interstate commerce requirement satisfied "as a matter of law." [419 U.S. at 192] This Court squarely reversed, holding that defendants' activities were not "in commerce," and that even if "affecting commerce" were the relevant jurisdictional standard under the Clayton Act, such effects could not be presumed:

The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions...

Copp... argued merely that such effects could be presumed from the use of asphaltic concrete in interstate highways. The District Court concluded, on the basis of the record before it, that petitioners' alleged antitrust violations had no 'substantial impact on interstate commerce'.... [T]he con-

clusion of the District Court... cannot be considered erroneous. [419 U.S. at 202-03]

If the sale of asphalt for direct use in constructing and repairing interstate highways cannot be presumed to substantially affect interstate commerce, then, *a fortiori*, brokerage services in New Orleans, which are only incidentally and tangentially related to realty financing, cannot be so presumed.

#### **B. Brokerage fees do not presumptively affect interstate commerce**

Plaintiffs contend for the first time in this Court that any effect on interstate commerce stems not principally from the functions brokers perform, but rather, from the prices they charge. Plaintiffs (at 54), and the government (at 15), ask this Court to presume that the brokerage fees, which are solely paid by home sellers,<sup>6</sup> are passed on to buyers in the form of higher home prices, which in turn lead to higher mortgage loans, which in turn affect the interstate flow of money.

Because this "passing-on" theory was never presented to or commented upon by the lower courts, it should not be considered here.<sup>7</sup> The theory, in any

<sup>6</sup> Derbes deposition at 67 (page not reproduced in plaintiffs' appendix).

<sup>7</sup> In *Ramsey v. United Mine Workers*, 401 U.S. 302 (1970), an antitrust suit against a union, plaintiff, just like plaintiffs here, presented a new theory in the Supreme Court as to why the Sherman Act was applicable to defendant's conduct. This Court declined to consider it:

We find no reference to this aspect of the case in the opinions of the District Court and the Court of Appeals. We are unsure whether it was presented below and whether, in any event, there is record support for it. Accordingly, we deem

event, is totally without support in the record and directly conflicts with this Court's recent decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

First, no evidence in the record suggests in any manner that home sellers do in fact pass-on brokerage fees to buyers. Moreover, the residential real estate market is a classic example of an atomistic market with many, many sellers and buyers, and prices determined by supply and demand. There is nothing in the record to suggest that those sellers using brokers have sufficient market power to pass-on their higher costs.<sup>8</sup>

Second, in *Illinois Brick, supra*, this Court held that because of "evidentiary complexities and uncertainties" [431 U.S. at 732], antitrust plaintiffs would not be permitted even to try to show that any alleged unlawful overcharges were passed-on to them through an intermediary. Like Sherman Act interstate commerce

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it inappropriate to consider it in the first instance. [401 U.S. at 312]

Here, not only was plaintiffs' "passing-on" theory not presented below, it is totally without record support.

<sup>8</sup> For example, in *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13, 26 (E.D. Pa. 1970), *aff'd*, 438 F.2d 1187 (3d Cir. 1971), the court dismissed an antitrust action by homebuyers against plumbing fixture manufacturers, commenting that to assume any plumbing overcharges were passed-on in the form of higher home prices would be "incredible":

It would be incredible if the price of a house were determined not by the shifts in supply [and] demand in the market for homes as a whole but rather by a relatively miniscule change (with respect to the selling price of the house) in the price of plumbing fixtures. . . . [T]he claims of the plaintiffs under consideration in their capacity as homeowners are blocked by insurmountable difficulties of proof.

questions, which are resolved based on real-world "intensely practical concept[s]" [*Yellow Cab Co., supra*, 332 U.S. at 231], the Court's decision in *Illinois Brick, supra*, was firmly grounded "'in the real economic world, rather than an economist's hypothetical model'." [431 U.S. at 732] Yet, the hypothetical model repudiated in *Illinois Brick, supra*, is precisely plaintiffs' theory here—that brokerage fees are passed-on to homebuyers through an intermediary, the seller. If the Court were to accept plaintiffs' speculation, and hold that homebuyers are injured by an alleged conspiracy among brokers to raise fees, then it would, in effect, be overruling the precise holding of *Illinois Brick, supra*, that persons in the position of these buyers cannot be injured parties under the antitrust laws.

Moreover, even if the actual holding of *Illinois Brick, supra*, does not absolutely bar plaintiffs' passing-on theory here, the case, at a minimum, establishes that passing-on cannot be presumed, as plaintiffs seek to do. The majority simply outlawed the passing-on theory altogether based on "'sound laws of economics'." [431 U.S. at 743] The dissenters saw some vitality in the theory, but recognized that it could not be presumed, but instead must be proved:

[T]his is a factual matter to be determined based on the strength of the plaintiff's evidence . . . Admittedly, there will be many cases in which the plaintiff will be unable to prove that the overcharge was passed on. [431 U.S. at 759 (Brennan, J., dissenting)]

In first outlawing the theory as a defense in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392



U.S. 481 (1968), the Court suggested that since proving any passing-on:

would require a convincing showing of . . . virtually unascertainable figures, the task would normally prove insurmountable. . . . [392 U.S. at 493]

This consistent judicial scorn for the speculative passing-on doctrine is hardly grounds for creating a presumption here, since as this Court has held: "a presumption upon a matter of fact . . . means that common experience shows the fact to be so generally true that courts may notice the truth." *Greer v. United States*, 245 U.S. 559, 561 (1918).

Thus, based on *Illinois Brick, supra*, *Hanover Shoe, supra*, the complete lack of supporting evidence in the record, and the fact that the argument was not presented in the lower courts, plaintiffs' presumptive passing-on theory should be rejected.

#### IV. A Substantial Effect On Interstate Commerce Cannot Be Presumed Merely Because Plaintiffs Have Alleged A Per Se Antitrust Violation

Plaintiffs' final argument, which we note has not been endorsed by the government, is that antitrust violations that are *per se* unlawful, *ipso facto* substantially affect interstate commerce. Plaintiffs have cited no decision of this Court or any lower court that has accepted this theory. Indeed, all the precedent is to the contrary. In *Goldfarb, supra*, for example, the first two issues decided by the Court were:

Did respondents engage in price fixing? If so, are their activities in interstate commerce or do they affect interstate commerce? [421 U.S. at 780]

Each issue was separately discussed and resolved. Similarly, in *Gulf Oil Corp., supra*, where defendants were charged with tying, a *per se* antitrust violation,<sup>9</sup> the Court refused to presume a substantial effect on interstate commerce. The Sherman Act itself only prohibits contracts in restraint of "trade or commerce among the several states." 15 U.S.C. § 1 (1976). Plaintiffs simply have no justification in law or policy for their position.

Moreover, holding that *per se* antitrust violations *ipso facto* substantially affect interstate commerce would sweep into the federal domain literally thousands of local practices that previously had been of exclusive state concern. As this Court commented in *United States v. Bass*, 404 U.S. 336 (1971):

[U]nless Congress conveys its purpose clearly it will not be deemed to have significantly changed the federal-state balance. [*Id.* at 349]

Here, not only has Congress given no indication that the Sherman Act interstate commerce requirement should be dropped, but it has also, as discussed above at 10-11, indicated that its power over real estate transactions is quite limited. Thus, plaintiffs' contention as applied to the facts of this case would violate fundamental principles of federalism. See *National League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>9</sup> *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1957).

**CONCLUSION**

Plaintiffs (at 13) have conceded that the defendant New Orleans real estate brokers are not in commerce. Plaintiffs have failed to prove any facts showing that defendants substantially affect commerce. Plaintiffs' requests that this Court presume such effects are wholly misguided legally and factually. Accordingly, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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SEP 11 1979

MICHAEL ROBAK, JR., CLERK

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1501

JAMES JEFFERSON McLAIN, et al,  
Petitioners,  
versus

REAL ESTATE BOARD OF NEW ORLEANS, et al,  
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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10 September 1979

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1979

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No. 78-1501

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JAMES JEFFERSON McLAIN, et al,  
Petitioners,

versus

REAL ESTATE BOARD OF NEW ORLEANS, et al,  
Respondents.

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

BRIEF FOR CERTAIN RESPONDENTS

---

**QUESTION PRESENTED**

Whether the Court of Appeals correctly decided, on the evidence contained in the depositions taken by Petitioners to overcome Respondents' jurisdictional challenge, that the jurisdiction of the Federal courts under the Sherman Act does not extend to an alleged agreement by Respondent real estate brokers to fix com-



missions on the sale of residential real estate in the Greater New Orleans area.

## STATEMENT

So much of the argument in the briefs of Petitioners and the Solicitor General is addressed to broad general propositions and factual matters dehors the record that this counter statement is needed to clarify what is before the Court on this review.

First, the dismissal of which review is sought was not on the face of the pleadings for failure to state a claim on which relief could be granted; rather, dismissal was ordered for lack of subject matter jurisdiction *only after giving Petitioners full opportunity to make the requisite jurisdictional showing and after receipt of evidence submitted by them to satisfy this requirement*. Accordingly, the propriety of the dismissal must be judged on the evidence adduced by Petitioners and not on general, conclusory statements of what might have been proved.

Second, and no less important, the issue presented by this application is not whether residential sales by realtors may be subject to the Sherman Anti-trust Act upon a proper showing of connexity with interstate transactions but whether the proof herein adduced by Petitioners satisfies this requirement of a showing of connexity.<sup>1</sup>

<sup>1</sup> This "connexity" may be that the activities are "in" interstate commerce or "directly or substantially affect" interstate commerce.

The only factual allegations of the complaint are that Petitioners, residents of Orleans and Jefferson Parishes, Louisiana, purchased or sold residences in those parishes and that Respondents "provided real estate brokerage" in each transaction.<sup>2</sup> The remaining allegations are non-specific and conclusory: that Respondents "have violated Section 1 of the Sherman Act" and continue to combine and conspire "to restrain interstate trade and commerce in the offering for sale and sale of real estate brokering services"<sup>3</sup>; that the combination and conspiracy consist of "a continuing agreement and concert of action "to fix, control, raise, and stabilize prices for the purchase and sale of real estate in a knowing, arbitrary, unreasonable and unlawful way"<sup>4</sup>; and that Respondents have committed "certain overt acts" in furtherance of the combination and conspiracy, principally, promoting and maintaining fixed commission structures and discouraging price competition.<sup>5</sup> No such overt acts are identified.

The jurisdictional allegations — which are critical for this review — are that many residential buyers and sellers are persons moving into or out of New Orleans and that Respondents assist their clients in financing and

<sup>2</sup> Complaint, par. IV, McLain Pet. App. 2a-3a. The Complaint was filed on 31 October 1975.

<sup>3</sup> Complaint par. XV, McLain Pet. App. 9a.

<sup>4</sup> Complaint par. XVI, McLain Pet. App. 9a-10a.

<sup>5</sup> Complaint par. XVII, McLain Pet. App. 10a-11a.

insuring with out-of-state sources.<sup>6</sup> Respondents moved to dismiss for lack of subject-matter jurisdiction on the basis of affidavits by two local realtors that the services of a real estate broker were not indispensable to the sale and purchase of real estate in the State of Louisiana, that

The essential function of a Louisiana real estate broker consists of counseling purchasers or sellers of real estate situated in the State of Louisiana, assisting them in establishing the price of properties and bringing about agreements to purchase and sell. Brokers earn their commissions upon procuring a purchaser or seller, as the case may be, and have essentially completed their function at that time.

and that real estate brokers had nothing to do with financing or title examinations.<sup>7</sup>

<sup>6</sup> Complaint pars. XIII-XIV, McLain Pet. App. 9a. Petitioners utterly failed to prove the latter allegation and the former was properly dismissed as legally insufficient unless such purchasers or sellers crossed state lines for the purpose of selling or buying residences. Petitioners explicitly recognize the insufficiency of, if they do not altogether abandon, the former contention. at page 35 of their brief:

... The extent to which migration or emigration occurs within a given local real estate market is probably not sufficiently uniform to provide a general criterion of interstate commerce involvement. . .

Other than an affidavit by one of Petitioners as to his experience at a time beyond the Statute of Limitations (R. 121), there is no evidence whatsoever supporting this allegation.

<sup>7</sup> Affidavits of Max Derbes, Jr. and Dalton Truax, A.41, 43. This statement of the function of real estate brokers is consistent with

Approximately two months after the filing of Respondents' Motion to Dismiss and consideration of the parties' memoranda, the District Judge heard oral argument and took the matter under advisement.<sup>8</sup> On 3 September 1976, three months later, the Judge called a conference of counsel at which the issue of jurisdiction was discussed and following which he issued an order reading in pertinent part:

The Court advised counsel that it appears plaintiffs may satisfy said jurisdictional requirement only by bringing the facts of this case within the parameters of the Supreme Court's holding in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). It is recognized, however, that further discovery is needed on the issue of *Goldfarb's* applicability *sub judice*. More specifically, such discovery should determine whether, in the first place, there is the requisite interdepend-

the law of Louisiana as stated in *Eanes v. McKnight*, 262 La. 915, 265 So.2d 220, 228 (1972):

The broker earns his commission even if the sale is not consummated when he procures a purchaser, ready, willing and able to buy on terms prescribed by the principal. . . .

To the same effect, see *Cooley v. Miller*, 320 So.2d 317, 318-19 (La. App. 3 Cir. 1975).

Louisiana law defines a real estate broker in terms of the activities in which he engages and states, in part, that such a broker is one who "[a]ssists or directs in the procuring of prospects or the negotiation or closing of any transaction, other than mortgage financing, which does or is calculated to result in the sale, exchange, leasing, or renting or any real estate . . . ." La. R.S. 37: 1431(2)(f).

<sup>8</sup> A. 76-77.



ence between the brokerage activity of defendants and the financing and/or insuring of real estate transactions in the New Orleans area and, secondly, whether there is a substantial involvement of interstate commerce in such real estate transactions *via* the financing and/or insurance aspects thereof.

The parties shall confer with regard to the procedure of discovery along these lines. Following such discussions, another conference will be held in this matter at 4:00 P.M. on Wednesday, October 13, 1976.<sup>9</sup>

Petitioners took no immediate steps to implement this directive and, at another conference held on 13 October 1976, the District Judge fixed 31 December 1976 as the cut-off date for discovery.<sup>10</sup> Petitioners continued to do nothing until 17 December 1976 when they issued the first of some nine notices of depositions, which were taken at various times between 28 December 1976 and 13 January 1977.<sup>11</sup>

Further memoranda were filed by both Petitioners and Respondents and on 31 May 1977 the District Judge handed down his memorandum opinion and order dismissing the complaint for lack of subject

<sup>9</sup> A. 82.

<sup>10</sup> R. 317.

<sup>11</sup> A. 83-96. On 22 December 1976 Petitioners obtained an additional fourteen-day extension of time to take the depositions. A. 98.

matter jurisdiction.<sup>12</sup> An appeal was taken to the Court of Appeals for the Fifth Circuit, which affirmed the dismissal.<sup>13</sup> It is to review this decision that a Writ of Certiorari was sought and granted.

## SUMMARY OF ARGUMENT

Respondents' alleged violation of the Sherman Act by conspiring to fix commissions on the sale of residential real estate in the New Orleans area is a purely intrastate activity. The evidence submitted by Petitioners in opposition to Respondents' motion to dismiss for lack of jurisdiction does not establish any activity on Respondents' part either in interstate commerce or substantially or directly affecting such commerce. Consequently, *Goldfarb v. Virginia State Bar*, in which title examinations by local attorneys were held to be an integral part of interstate financing and title insurance, does not support Petitioners' effort to invoke Federal jurisdiction.

The decisions cited by Petitioners as authority for holding that Respondents' alleged conspiracy to fix commissions on the sale of residential real estate "affect" interstate commerce involved interstate commerce or intrastate activities so closely and essentially integrated therewith as to be inseparable therefrom. The incidental or fortuitous effect of possible in-

<sup>12</sup> McLain Pet. App. 17a; reported at 432 F.Supp. 982.

<sup>13</sup> McLain Pet. App. 24a; reported at 583 F.2d. 1315 (5 Cir. 1978).

creases in the price of residences and consequent need for additional amounts of interstate financing falls far short of the requisite substantial or direct effect. Petitioners' contentions find no support in the cited authorities.

## ARGUMENT

### I.

#### **Petitioners Have Failed To Demonstrate That Respondents Have Engaged In Any Activities Which Either Are "in Interstate Commerce" Or "Substantially Or Directly Affect Interstate Commerce."**

The Complaint herein was properly dismissed for lack of jurisdiction because of Petitioners' failure to prove that Respondents engaged in any activity which was either in interstate commerce or substantially or directly affected interstate commerce. The "offense" which Petitioners allege to have constituted a violation of Section 1 of the Sherman Act is a conspiracy to fix commissions on the sale of residential real estate in the New Orleans area.<sup>14</sup> It is difficult to conceive of an activity more truly intrastate in nature.

In an effort to subject this patently intrastate activity to Sherman Act jurisdiction, Petitioners allege that many purchasers or sellers of residential real estate are persons moving into or out of the New Orleans area

<sup>14</sup> Complaint pars., McLain pet. app. 9a-10a.

and that Respondents assist their clients in securing financing and insurance for such purchases.<sup>15</sup> Respondents moved to dismiss for lack of federal jurisdiction on the basis of affidavits controverting these allegations and essentially reciting that the role of real estate brokers in Louisiana is limited to bringing purchasers and sellers together.<sup>16</sup>

With their opposition to the motion to dismiss, Petitioners submitted affidavits from a loan guaranty officer for the Veterans Administration and an area economist for the Department of Housing and Urban Development as to the volume of VA insured homes and FHA loan operations in the Parishes of Orleans and Jefferson,<sup>17</sup> relying on various authorities and particularly *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1974) as dispensing with the need for further proof.

After hearing oral argument and considering the matter for several months, the District Judge called a conference of counsel and instructed petitioners to conduct whatever discovery they deemed necessary to establish the applicability of *Goldfarb* — on which petitioners had stated they rested their case.

Three and one half months later (out of four months allowed by the District Judge), Petitioners noticed and

<sup>15</sup> Complaint pars. XIII, XIV, McLain pet. app. 9a.

<sup>16</sup> A. 18-19, 40-44.

<sup>17</sup> A. 68-71.



took the depositions of three realtors (Max Derbes, Jr., Stan Weber and A. T. Post), a mortgage banker (Julian O. Hecker, Jr.), a representative of a title insurance company (James W. Mills, Jr.), the president of a homestead (Edmond G. Miranne), the loan guaranty officer of the Louisiana Veterans Administration office (Paul Griener), an area economist in the New Orleans HUD area office (Angel Miranda) and a representative of the New Orleans HUD office for Housing Department on Mortgage Credit (Meaher P. Turner).<sup>18</sup>

These depositions establish nothing more than that substantial amounts of money to finance the purchase of residential real estate in the New Orleans area come from out of state and that title insurance is afforded exclusively by out-of-state corporations. No witness testified, and there is no evidence, that Respondents — in stark contrast to the attorneys examining titles in *Goldfarb* — play a necessary or integral part in financing the purchase of or insuring the title to real estate or even play any part therein. On the contrary, while admitting that real estate agents were normally present at the closing of the sale, these witnesses uniformly testified that financing and insurance were no part of the agent's business.

The mortgage banker (Hecker) testified that realtors assisted in obtaining documentation for processing of loans, but that their services were to bring the purchaser and seller together and that these services

<sup>18</sup> Excerpts from all of these depositions except those of A. T. Post and Paul Griener are incorporated in the appendix commencing at A. 122.

were in no way an integral part of the process of lending.<sup>19</sup> The homestead president (Miranne) was more specific and more emphatic; while acknowledging that real estate agents sometimes brought borrowers to his homestead and sometimes remained with the borrower, he said:

You prefer them not to sit there, because, frankly, making a loan is none of their business, the real estate agent. I don't mean that to be derogatory. It is not the agent's job.<sup>20</sup>

In response to a question as to the real estate agent's role in obtaining the loan, Mr. Miranne said:

No role whatsoever, other than merely to bring the person down here. . . .

We basically do not need the realtor at all to bring him down and, basically, we would prefer just to talk directly to the borrower. . . . And, the agent may not like me to say this, but they play no part other than to get them to us

. . . <sup>21</sup>

Responding to a question as to the role played by real estate agents in the homestead's granting or not granting the loan, Mr. Miranne said:

<sup>19</sup> A. 195, 198.

<sup>20</sup> A. 137-138. Homesteads in Louisiana correspond to savings and loan associations in other states.

<sup>21</sup> A. 145-6.

*They would play no part at all. I would say they play no role other than a person to get them to us and sit them down, and that is about it.*<sup>22</sup>

\* \* \*

Q. Would it be a fair statement to say that in your opinion, a realtor's services are not essential to the making of a loan through Security Homestead?

A. It would be a fair statement to make that, yes.<sup>23</sup>

Mr. Miranne likewise denied that the real estate agent played any role in examination of the title to the property or in underwriting the lending.<sup>24</sup>

Controverting Petitioners' allegation on information and belief in paragraph VI of their complaint, Mr. Derbes categorically denied that the Real Estate Board of New Orleans was a member of Realtron, Inc.<sup>25</sup> He also testified that he personally was aware of hundreds of houses which were sold by builders without interposition of a real estate broker.<sup>26</sup>

<sup>22</sup> A. 146-7 (emphasis added).

<sup>23</sup> A. 148, 157.

<sup>24</sup> A. 151-157.

<sup>25</sup> A. 237-239.

<sup>26</sup> A. 252. This testimony is consistent with the statement made in Petitioners' brief as to the Senate Committee Report on the Real Estate Settlement Procedures Act of 1974 that about 60% of the real estate transactions studied reported payment of a real estate commission, the balance being presumably sold by the owner or builder directly, Petitioners' brief, 37.

Mr. Weber testified that any referral commissions received by him on the sale of property outside of the State of Louisiana were not for the sale of the property, but from the selling agent for putting him in touch with the purchaser.<sup>27</sup>

As the Court of Appeals for the Fifth Circuit observed, real property is the quintessential local product<sup>28</sup> and this Court, in *U.S. v. National Association of Real Estate Boards*, 339 U.S. 485, 488, 70 S.Ct. 11, 94 L.Ed. 1007 (1950), specifically noted that no interstate commerce was involved in alleged fixing of commissions for the sale of real estate. It is only where some nexus with interstate commerce is shown, either by integrating the intrastate operation into an identifiable stream of interstate commerce or by proof that the intrastate operation directly or substantially affects interstate commerce, that the undeniably intrastate character of Respondents' alleged agreement to fix the level of commissions on the sale of residential real estate can be overcome. Petitioners' proof falls far short of this requirement and the judgment of dismissal entered by the District Court and affirmance of this judgment by the Court of Appeals for the Fifth Circuit were and are correct and should be affirmed by this Court.

Reference is repeatedly made both in the brief of Petitioners and in that of the Solicitor General to the "activities" of real estate agents generally; the issue for

<sup>27</sup> A. 286.

<sup>28</sup> 583 F.2d 1315, 1319.



determination herein, however, is not whether some unspecified activities on the part of real estate agents might subject them to the jurisdiction of the Sherman Act, but whether the evidence herein adduced by Petitioners for the purpose of satisfying the jurisdictional requirement is sufficient to support a finding that the alleged agreement of Respondents to fix the level of real estate commissions on the sale of residential real estate in the New Orleans area was in or directly or substantially affected interstate commerce.

It is clear from Petitioners' evidence that Respondents do not obtain and are not instrumental in obtaining financing of credit sales and are not involved in examining titles or obtaining title insurance on behalf of their clients. The record is clear that Respondents' function is to counsel purchasers and sellers of real estate in Louisiana, to assist them in establishing prices and to bring about agreements to purchase and sell.<sup>29</sup> Respondents earn their commission for the service of procuring a purchaser or seller for their client and, when they do, essentially complete their duties.<sup>30</sup> Even where the agreement makes payment of a commission contingent upon the purchaser's procuring financing, it is the purchaser rather than the broker who dictates

<sup>29</sup> Affidavits of Messrs. Derbes and Truax, A. 40-1, 42-43.

<sup>30</sup> The broker may, and frequently does, agree that no commission is to be paid if the purchaser fails to obtain financing. Even if the sale is not consummated, however, the broker "earns" his commission for procuring a purchaser ready, willing and able to purchase upon the principals' terms. See *Eanes v. McKnight*, 262 La. 915, 265 So.2d 220 (1972); *Cooley v. Miller*, 320 So.2d 317, 318-319 (La. App. 3d Cir. 1975).

that term, thereby obligating himself to make a good faith effort to secure the needed funds.<sup>31</sup>

Respondents have no authority at all under the standard listing agreement to obtain financing for their clients and have no essential role in the loan process.<sup>32</sup> The alleged practices of brokers' inquiring of mortgage bankers as to the terms of available financing or accompanying their clients to mortgage offices fall far short of bringing brokers into "participation" in financing.<sup>33</sup> Moreover, it is the lender, not the broker, who requires that the purchaser insure the title to property and the purchaser himself deals directly with the title insurance company.

Loan guarantees by the Veterans Administration and HUD likewise do not involve Respondents nor require their assistance.<sup>34</sup> HUD subsidies are paid directly to the lender or mortgagee without a broker's intervention;<sup>35</sup> nor does the VA deal with the broker in deciding whether to guarantee a loan for the purchaser.

<sup>31</sup> The purchaser's interest in obtaining the commission at the time the purchase agreement is executed is necessarily adverse to postponement in this fashion.

<sup>32</sup> Miranne deposition, A. 157. Absent special agreement, the broker has no authority to bind his principal or to negotiate in his behalf. See *Leggio v. Realty Mart, Inc.*, 303 So.2d 920 (La. App. 1st Cir. 1974). Brokerage services are contracted for independently of financing as evidenced by separate listing, purchase and loan agreements.

<sup>33</sup> Miranne deposition, A. 148, 157; Hecker deposition, A. 198.

<sup>34</sup> Miranne deposition, *passim*.

<sup>35</sup> Turner deposition, A. 225-227.

It is clear, therefore, that Respondents neither "assist" nor "participate" in obtaining financing, title insurance and loan subsidies or guarantees.

That some Respondents may subscribe to national relocation services is irrelevant, since Petitioners do not complain of price-fixing in this distinct aspect of the brokerage business. This fact does not establish jurisdiction, since jurisdiction must be based on a nexus between the acts complained of and the alleged effect upon commerce. The test of jurisdiction under the anti-trust laws is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.<sup>36</sup>

The requisite direct effect upon commerce is not established by the incidental interstate movement of some of Respondents' customers.<sup>37</sup> The fact that Respondents hold funds in escrow is likewise insufficient to confer jurisdiction, since this activity has no effect on the price of brokerage services.<sup>38</sup>

Every local enterprise inevitably has some effect, however remote, upon interstate commerce, but some

<sup>36</sup> *Page v. Work*, 290 F.2d 323, 330 (9 Cir. 1961).

<sup>37</sup> *Marston v. Ann Arbor Property Mgmt. Ass'n*, 302 F.Supp. 1276, (E.D. Mich. 1969); *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167 (8 Cir. 1959).

<sup>38</sup> Moreover, there was no proof that escrow funds are derived from interstate sources.

*de minimis* factor must intervene. Thus any increase in the amount of interstate financing resulting from higher brokerage commissions (presumed but not proved) is no more than an incidental or fortuitous effect of such higher commissions.<sup>39</sup> As is more fully discussed in the following section of this brief the "effect" on interstate commerce required to subject an intrastate activity to federal jurisdiction must be possible frustration of the interstate activity to which it is related, stifling or restraint of interstate commerce, or result from its being an essential and integral part thereof. If this were not so, federal regulation would be boundless and intrastate commerce would be completely destroyed as a legal concept.<sup>40</sup>

Petitioners' present ambivalence toward the decision of this Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1974),<sup>41</sup> and the implication that the requirement of showing of facts comparable to those in *Goldfarb* was the District Judge's idea stand in interesting contrast to Petitioners' enthusiastic and unreserved reliance on *Goldfarb* in the district

<sup>39</sup> Petitioners' claim that an increase in brokerage commissions affects the amount financed is spurious because financing is based upon the appraised value of property, rather than upon the price of the property.

<sup>40</sup> *Rasmussen v. American Dairy Ass'n*, 472 F.2d 529, 536 (10 Cir. 1972).

<sup>41</sup> In their Summary of Argument, Petitioners contend that *Goldfarb* is of only limited relevance, (Petitioners' brief, p. 12) and *Goldfarb* is distinguished as an "in commerce" case, "the methodology" of which was misapplied to the instant case (Petitioners' brief, pp. 12-13).



and appellate courts. Despite this ambivalence, Petitioners persist in their misreading of *Goldfarb*; for example, they say

In *Goldfarb v. Virginia State Bar*, the Court held that transactions in land, the most local commodity, have interstate commerce aspects.<sup>42</sup>

and

Since in *Goldfarb* the question of the application of the Sherman Act to the real estate market was a matter of first impression, . . .<sup>43</sup>

Your Honors' decision in *Goldfarb* did *not* hold that transactions in land have interstate commerce aspects. The regulated activity in *Goldfarb* was examination of titles to real estate, which the defendant Bar Association contended was exempt from federal regulation because the titles examined were to real estate. The holding in *Goldfarb* was simply that the legal service in question, for which a minimum fee was prescribed by the Bar Association, was an integral part of financing, title insurance and loan guarantees, all of which were indisputably interstate in character.

Contrary to Petitioners' contention, *Goldfarb* did not hold that transactions in land have interstate commerce aspects, but that examination of titles to real

<sup>42</sup> Petitioners' brief, pp. 18-19.

<sup>43</sup> Petitioners' brief, p. 19.

estate, being indispensable to interstate financing and title insurance, constitutes an integral part of an interstate transaction. There was no holding as to transactions in land generally, but only as to the legal service of title examination which was held to be subject to federal regulation notwithstanding that the titles examined were to real estate.

The *Goldfarb* test is satisfied only by a two-fold determination that the activity complained of is (1) an essential, integral part of (2) the interstate aspects of the transaction. Thus, not only must Petitioners establish that Respondents' services are essential to an interstate transaction — itself a dubious proposition in view of the number of sales that concededly occur without broker involvement<sup>44</sup> — but they must also establish that the local services are indispensable to the *interstate aspects of the transactions*.

Petitioners have not satisfied this requirement, but have resorted to unfocused generalizations about the "local real estate market" and "the activities of realtors".<sup>45</sup> Interstate commerce is, however, "an intensely practical concept drawn from the normal and accepted course of business."<sup>46</sup> It is not to be determined by labels or generalizations. An examination of Petitioners' efforts to identify concrete examples in support of

<sup>44</sup> Derbes' deposition, A. 40-42; Petitioners' brief, p. 37.

<sup>45</sup> See, e.g., Petitioners' brief, p. 49.

<sup>46</sup> *United States v. Yellow Cab Co.*, 332 U.S. 218, 231, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).

these abstractions reveals that the alleged nexus between Respondents' services and interstate commerce is here at most remote and incidental.

Petitioners would have your Honors stand *Goldfarb* on its head. The intrastate activity in *Goldfarb* (examination of titles) was held to be subject to the Sherman Act because it was determined to be "an integral part of an interstate transaction", viz. title insurance and realty financing. This was so because title examination was a prerequisite to title insurance and financing and was a means to that end.

By contrast, Respondents' services are not a prerequisite to either title insurance or financing<sup>47</sup> and the sale is an end in itself subsequent to which a buyer may or may not obtain title insurance and financing depending upon his needs and desires. The roles of the attorney in *Goldfarb* and Respondents are wholly dissimilar.

Petitioners contend that the amount of the real estate agent's commission determines the cost of a house, that the increased cost attributable to the real estate commission in turn determines the amount financed (through interstate sources) and that fixing commissions in this fashion "affects" interstate commerce. This facile reasoning is deficient because it takes no account of the meaning of "effect on interstate commerce" as enunciated by this Court in its various

<sup>47</sup> Many residences are sold otherwise than through real estate agents. Affidavit of Max Derbes, A. 252; Petitioners' brief, p. 37.

"affectation" decisions. These decisions are analysed in the following portion of this brief.

## II

### **Petitioners Have Cited No Authority For The Proposition That As A Matter Of Law An Agreement To Fix Brokers' Fees For The Sale Of Residential Real Estate, In And Of Itself, Is Subject To The Sherman Act.**

In considering the sufficiency of Petitioners' evidence on the issue of jurisdiction, the allegations of the complaint as to the restrained activity must be borne in mind. The only "offense" charged in the complaint is an alleged agreement to fix commissions on the sale of residential real estate.<sup>48</sup> It follows from this that *this particular activity* on Respondents' part must somehow be shown to be in interstate commerce (a contention apparently abandoned by Petitioners in their brief)<sup>49</sup> or substantially or directly to affect interstate commerce.

Petitioners place principal reliance on *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948); to a lesser extent, they rely also on *Burke v. Ford*, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967); *United States v. Womens' Sportswear Ass'n*, 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805 (1949); *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954); *United States v. Employing*

<sup>48</sup> Complaint Pars. XV-XVI, Pet. App. 9a-11a.

<sup>49</sup> Petitioners' brief, pps. 12-13.



*Lathers Ass'n*, 347 U.S. 198, 74 S.Ct. 455, 98 L.Ed. 627 (1954); and *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976). Petitioners' reliance is misplaced, as the teaching of these cases is that the "affectation" requisite to federal jurisdiction requires a showing of more than some incidental effect on price.

*Mandeville Island Farms*, despite use by this Court of the term "affectation", on its facts is an "in commerce" case. The plaintiffs in *Mandeville Island Farms* were growers of sugar beets and the defendants refiners; their endeavors were not separate and independent, however, but were inextricably linked. Thus the refiners, who were admittedly in interstate commerce, controlled the supply of seed needed by the plaintiffs to plant their crops. They entered into contracts with plaintiffs for the latter to grow sugar beets, under the term of which the refiners were given the right to supervise the growing, including the right to ascertain quality during growing and harvesting seasons by sampling and polarizing. In addition, the contracts required the plaintiffs to make preliminary preparations for processing the sugar beets into raw sugar, so that the growing of sugar beets was effectively made a subsidiary operation by the refiners and gave them control from the farm to the consumer.

Dismissal having been entered on the face of the pleadings, Your Honors determined the legal issues

with relation thereto<sup>50</sup> and noted that these allegations related specifically to

... the peculiarly integrated character of the industry, effects of the arrangements upon interstate commerce, and the relation between the violations charged and the injuries suffered by petitioners.<sup>51</sup>

The "unique structure and special mode of operation" of the industry was noted<sup>52</sup> and the contention that growing and refining were two entirely separate activities (the former intrastate) was explicitly rejected on the grounds that this contention did not take into account the "economic continuity" of production and manufacturing on the one hand and commerce on the other.<sup>53</sup>

Commenting further on the special nature of the relationship between the plaintiffs as growers and the defendants as refiners, the Court observed:

For this is not a case involving only 'a course of conduct wholly within a state'; it is rather one involving 'conduct which is an inseparable element of a larger program dependent for its

<sup>50</sup> 334 U.S. at 221.

<sup>51</sup> *Id.* at 224.

<sup>52</sup> *Id.* at 224-5.

<sup>53</sup> *Id.* at 229.

success upon activity which affects commerce between the states,' and in such a case it is not material that the source of the forbidden effect upon that commerce arises in one phase or another of that program.<sup>54</sup>

\* \* \*

We deal here, as petitioners say, with an industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar. In the middle of all these processes and dominating all of them stand the refiners.<sup>55</sup>

\* \* \*

Finally, the interdependence and inextricable relationship between the interstate and the intrastate effects of the combination and monopoly are shown perhaps most clearly by the provision of the uniform price agreement which ties in the price paid for beets with the price received for sugar.<sup>56</sup>

In conclusion, the Court referred to "an industry so completely interlocked in all its stages, by all-inclusive contract as well as by industrial structure and organization" and explicitly limited its holding to the facts of that case:

<sup>54</sup> *Id.* at 237.

<sup>55</sup> *Id.* at 239.

<sup>56</sup> *Id.* at 241-2.

We deal with the facts before us. With respect to others which may be significantly different, for purposes of violating the statute's terms and policy, we await another day.<sup>57</sup>

It is submitted that the critical and distinguishing aspect of *Mandeville Island Farms* is that what would normally have been a purely intrastate activity, viz. the growing of sugar beets, was so inextricably integrated into an admittedly interstate overall process of growing, refining and selling sugar that it could no longer be considered to be separate. This is explicitly recognized in the following language:

To compare an industry so completely interlocked in all its stages, by all-inclusive contract as well as by industrial structure and organization, with one like producing, processing, and marketing fruits, vegetables, corn or other products, susceptible of various uses and under conditions affording varied outlets for market, both local and interstate, in the raw or refined state, in which neither such a contractual nor such an industrial integration exists, is to ignore the facts of industrial life. So is it also to make conclusive comparisons with other industries in which the manufacturing process requires and has available a greater variety of raw materials for making the finished product, and involves a longer and more extensive process of change,

<sup>57</sup> *Id.* at 243-4.



than does extracting the sugar content of beets to make raw sugar.<sup>58</sup>

To compare the supposed unquantified effect on interstate financing, title insurance and loan guarantees of increases in price of real estate reflecting higher brokerage commission with the unique interlocking of interstate and intrastate activities in *Mandeville Island Farms* is to demonstrate the complete insufficiency of petitioners' showing.<sup>59</sup>

*Burke v. Ford* had to do with territorial division of the State of Oklahoma by liquor wholesalers therein, which the Court found "almost surely" resulted in fewer sales to retailers and therefore fewer purchases from out-of-state distillers than would have occurred in the presence of free competition. The Court found, in addition, that the consequence of the division was fewer wholesaler outlets available to any one out-of-state distiller, in consequence of which the state-wide wholesalers market division "inevitably affected interstate commerce."<sup>60</sup> There is no suggestion of reduction in

<sup>58</sup> *Id.* at 243-4.

<sup>59</sup> Petitioners refer in a footnote to *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), Petitioners' brief p. 51. Regulation of the normally intrastate activity of growing wheat was justified in *Wickard* on the grounds that uncontrolled growing could frustrate the congressional purpose of stimulating trade in wheat at increase prices. The record herein is devoid of any suggestion that increased real estate commissions on residences will obstruct or have any effect whatsoever on interstate financing, title insurance or loan guarantee programs.

<sup>60</sup> 389 U.S. at 322.

demand for out-of-state financing, title insurance or loan guarantees in the record herein.

*Employing Plasterers* and *Employing Lathers*, like *Mandeville Island Farms*, presented a continuous flow of materials from out-of-state manufacturers to home owners. Commenting on the nature of the industry, Your Honors observed:

The practical effect of all this is a continuous and almost uninterrupted flow of plastering materials from out-of-state origins to Illinois job sites for use there by plastering contractors. Restraint or disruption of plastering work in the Chicago area thus necessarily affects this interstate flow of plastering materials adversely. . . . The effect of all this has been an unlawful and unreasonable restraint of the flow in interstate commerce of materials used in the Chicago plastering industry.<sup>61</sup>

Dismissal having been granted on the grounds that the complaint failed to state a cause of action on which relief could be granted under the Sherman Act (as in *Mandeville Island Farms*), the Court held that a sufficient restraint of trade in interstate commerce was alleged to constitute a cause of action. Here again, there was an integrated industry, the interstate portions of which were directly and substantially affected by the intrastate portions.

<sup>61</sup> 347 U.S. at 188.

*Women's Sportswear* involved agreements by stitchers, who would normally have been indisputably in intrastate commerce, which imposed restraints on jobbers, who were indisputably in interstate commerce. This court found that the stitching contractors' combination imposed restraints on the interstate activities of the jobbers of a character and magnitude to violate the Sherman Act:

The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states.<sup>62</sup>

It will be noted that the determinative criterion in *Women's Sportswear* was the stifling or restraint of interstate commerce, of which there is no evidence whatsoever in the instant case.

*Hospital Building Company*, in common with other progeny of *Mandeville Island Farms*, found a substantial effect on interstate commerce from restraint of intrastate activity where there were important areas of interstate commerce involved. Thus reliance was placed on, first, the plaintiff's purchase of a substantial proportion of its medicines and supplies from out-of-state sellers, second, the fact that a substantial number of its patients were alleged to come in from out of

<sup>62</sup> 336 U.S. at 464 (emphasis added).

state,<sup>63</sup> third, a large proportion of plaintiff's revenue was alleged to come from insurance companies outside of the state or from the federal government through Medicaid and Medicare, fourth, plaintiff's payment of a management service fee based on gross receipts to its parent company, a Delaware corporation based in Georgia, and fifth, plaintiff's having developed plans to finance a large part of its expansion through out-of-state lenders. Referring to these aspects of plaintiff's operations, this Court observed:

This combination of factors is certainly sufficient to establish a "substantial effect" on interstate commerce under the Act.<sup>64</sup>

Your Honors characterized the allegations of the complaint as fairly claiming that the alleged conspiracy, to the extent that it might be successful, would place unreasonable burdens on the free and uninterrupted flow of interstate commerce and were therefore wholly adequate to state a claim.

Of particular importance in considering these authorities from which petitioners seek to draw comfort, it should also be borne in mind that, in most of them, dismissal was on the face of the pleadings for failure to state a claim on which relief could be granted so

<sup>63</sup> Unlike the unidentified purchasers or sellers of homes alluded to in Petitioners' brief, such persons crossed state lines for the purpose of using the services of the hospital.

<sup>64</sup> 425 U.S. at 744.



that the criterion was the sufficiency of the allegations of the complaint. By contrast, Respondent's motion to dismiss did not challenge the legal sufficiency of the allegations of the complaint, but controverted them, and Petitioners were given ample opportunity to adduce proof of the facts alleged.<sup>65</sup>

Petitioners' contentions are confusing and inconsistent. On the one hand, they seek to rely on *Goldfarb* because, as they say, it held that real estate transactions were subject to the Sherman Anti-Trust Act, which of course is wholly incorrect. On the other hand, they disclaim *Goldfarb* as being an "in commerce" case and say that theirs is an affectation of commerce case. Further, they argue now in terms of the effect of interstate commerce on intrastate commerce and then in terms of the effect of intrastate commerce on interstate commerce.

The ultimate fact is that the role of Respondents, as real estate brokers define their role, in the words of the Derbes and Truax affidavits, which have at no time been controverted, is "counseling purchasers or sellers of real estate situated in the State of Louisiana, assisting them in establishing the price of property and bringing about agreements to purchase and sell." They

<sup>65</sup> The implication contained in Petitioners' brief that they were denied the opportunity of other, more meaningful, discovery is not to be taken seriously. In the first place, as noted above, Petitioners themselves relied on *Goldfarb* as authority for jurisdiction and, in the second place, the trial judge's directive was issued only after a conference with counsel (followed by two more conferences before the matter was submitted for decision) at which Petitioners could have asked for broader discovery had they believed it desirable.

play no part in the interstate financing of real estate purchases, in out-of-state title insurance thereon or in interstate guarantees of mortgages.

There is no similarity between these activities and those of the growers in the integrated sugar industry at issue in *Mandeville Island Farms* or any of the other situations in which a direct or substantial effect on interstate commerce was found. Petitioners have utterly failed to demonstrate the requisite direct or substantial effect.

*United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979), wherein the defendant real estate brokers were held to be subject to the Sherman Act, is in no way at variance with the decision of the Court of Appeals herein. The same test was applied by both courts, viz. whether the defendants' activities were an integral part of interstate commerce, but to widely different factual situations:

In this case, as in *Goldfarb*, the evidence was quite sufficient to permit the trier of fact to determine that the activities in question, here those of real estate brokers, were as a matter of practical necessity an integral part of an identifiable stream of interstate real estate transactions.<sup>66</sup>

*Foley* was an appeal from a conviction in a criminal anti-trust proceeding and the appeal was decided on the

<sup>66</sup> 598 F.2d at 1329 (emphasis added).

full record. The evidence in that record was completely different from that herein.

First, a "quite considerable volume" of transactions involved purchasers coming into the state and sellers leaving the state. Montgomery County in which the defendants carried on their business, was a suburb of the District of Columbia and the court found that the defendants had:

... consciously and understandably capitalized upon the highly transient nature of this particular real estate market.

In a footnote to its opinion, the court commented further on the active and aggressive efforts on the part of defendants to obtain customers from purchasers coming into the state and sellers leaving the state:

... there was much more of an interstate character to defendants' activities than merely awaiting passively the chance descent of out-of-state customers and then providing these with a purely 'local' service.<sup>67</sup>

Second, there was extensive advertising of brokerage services by various defendants in out-of-state media, including military and civil service personnel journals.

<sup>67</sup> *Id.* at 1330 n.4.

Third, some defendants participated in national "relocation" services and extensively used interstate channels of communication in developing and servicing the out-of-state clientele.

Fourth, considerable financing was provided by out-of-state lending institutions and substantial numbers of purchase loan mortgages were guaranteed by federal agencies headquartered in the District of Columbia.

Fifth, while the defendants did not participate directly in the interstate lending and loan guarantee transactions,

... they clearly held out as part of their brokerage services their ability to facilitate these. . . .<sup>68</sup>

In the footnote to this finding, the court cited an advertisement by one defendant that potential purchasers should consult a broker because of his ability to guide them to a loan and ability to negotiate the best available financing.<sup>69</sup>

By contrast, there is no evidence herein of the active pursuit of out-of-state customers. While there is an affidavit by one of the petitioners (Koch) that he had

<sup>68</sup> *Id.* at 1330.

<sup>69</sup> *Id.* at 1330 n.9.



purchased a home before moving to Louisiana, this transaction took place outside of the statute of limitations. There is no specific evidence of extensive advertising in out-of-state media. There is no specific evidence of participation in national relocation services and/or extensive use of interstate channels of communication in developing and servicing out-of-state clientele and the evidence directly controverts any suggestion of direct participation in interstate lending and loan guarantee transactions.

The Fourth Circuit Court of Appeals' conclusion that:

The overall picture that emerges is one of a substantial stream of interstate commerce in which these brokers' activities were not only an "integral part", but in practical effect the dominant factor in first creating a substantial interstate market by utilizing interstate advertising and referral services, and then drawing in interstate funding and loan guarantees for the resulting purchase money mortgages. . . .

appears to be justified by the record in that case, but would find no support whatsoever in the record herein. For all of these reasons, it is submitted that there is no conflict between *Foley* and the instant case, but, on the contrary, both cases apply the same test and simply present wholly different factual situations.

In its opinion the Fifth Circuit disposed of the contention that there exists a true "conflict" of authority on the sufficiency of the nexus between the services of brokers with interstate commerce by its recognition that diverse rulings resulted in part from "varying factual gradations".<sup>70</sup> The facts in *Foley* are at the opposite end of the spectrum from those adduced by Petitioners herein.

The facts of *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), illustrate the jurisdictional distinction between local services which have only an incidental effect on interstate commerce and local services which form an integral part of interstate commerce. There, the Government charged taxicab companies with conspiring to eliminate competition in the business of providing taxicab services in the Chicago area. This Court analysed two separate aspects of taxicab services: (1) defendants' contracts with railroads to transport interstate passengers between connecting trains at different Chicago train stations; and (2) defendants' general intracity taxicab service.

The Court viewed the local taxicab service between stations in relation to the entire interstate journey and characterized this service "an integral step" in the interstate movement of passengers.<sup>71</sup> The alleged restraint on such a constituent part of interstate com-

<sup>70</sup> 583 F.2d at 1320. See Respondents' brief in opposition to petition for certiorari, at pp. 17-24 for a reconciliation of these authorities.

<sup>71</sup> 332 U.S. at 228-29.

merce brought the Sherman Act into operation.<sup>72</sup> The Court reached the opposite conclusion, however, when it analysed defendants' general intracity taxi service.

The Government argued that the defendants' general service affected interstate commerce because many travelers began or ended interstate journeys by taking taxis to or from railroad stations. This Court held, however, that this service was not subject to the Sherman Act because its effect on interstate commerce was wholly incidental. This Court distinguished the general intracity service from that between railroad stations as follows:

We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation "between any two points within the corporate limits of the City." None of them serves only railroad passengers, all of them being required to serve "every person," within the limits of Chicago. They have no contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part of the rail-

<sup>72</sup> *Id.* at 229.

road fares. In short, their relationship to interstate transit is only casual and incidental.<sup>73</sup>

\* \* \*

Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance. Taxicab service is thus but one of many that may be used. It is contracted for independently of the railroad journey and may be utilized whenever the traveler so desires. From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey. To the taxicab driver, it is just another local fare.<sup>74</sup>

In sum, the teaching of *Yellow Cab* is that Sherman Act jurisdiction exists only if an alleged restraint acts

<sup>73</sup> *Id.* at 230-31.

<sup>74</sup> *Id.* at 231-32.



directly upon interstate commerce, or is an integral and inseparable part of another transaction that involves substantial interstate commerce. *Yellow Cab* likewise holds that wholly local activity that is only incidentally or fortuitously related to interstate commerce is not subject to the Sherman Act.

The relationship between the brokerage services here at issue and interstate commerce is attenuated at best. Respondents' local services are not essential to the interstate activity which allegedly accompanies some sales of realty. Unlike the taxi service between stations in *Yellow Cab* and the attorneys' services in *Goldfarb*, Respondents' services are not an integral part of interstate commerce. No legally cognizable nexus between the brokerage services and interstate commerce appears from the facts before the Court.

### CONCLUSION

The evidence submitted by Petitioners on the issue of jurisdiction is plainly insufficient and was properly so held by the District Court and the Court of Appeals. Respondents were not shown to play any part in any interstate financing incident to the purchase of residences or in insuring titles thereto. Unlike the role of the attorneys in *Goldfarb* who examined titles for interstate lenders or title insurers, which activity was an essential and integral part of the interstate process of financing and title examination, Respondents' activities are neither in nor do they substantially or directly

affect interstate commerce. The requisite nexus with such commerce is absent.

*Mandeville Island Farms* and other decisions cited by Petitioners as authority for the proposition that Respondents' alleged conspiracy to fix commissions on the sale of residential real estate in the New Orleans area substantially or directly affects interstate commerce are inapposite. In each such decision the interstate activity was determined to be so closely related as to have the potential of frustrating, stifling or restraining interstate commerce or to be so closely and inextricably integrated with interstate commerce as to be effectively inseparable therefrom. No such showing has been made herein.

The Court of Appeals correctly decided that, on the evidence submitted by Petitioners to overcome Respondents' jurisdictional challenge, Petitioners failed to show that Respondents' alleged conspiracy either was in or substantially or directly affected interstate commerce. The decision of the Court of Appeals upholding the District Judge's Dismissal of Petitioners' complaint should accordingly be affirmed.

Respectfully submitted,

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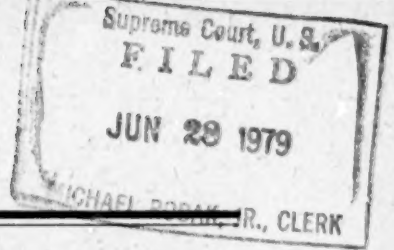
**CERTIFICATE OF SERVICE**

I certify this \_\_\_\_ day of September, 1979 that I have served three copies of the foregoing Brief For Certain Respondents upon Mr. Richard G. Vinet, 144 Elk Place, Suite 1202, New Orleans, Louisiana 70112, Attorney for Petitioners, by mailing same, postage prepaid, addressed to him at his office.

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HARRY McCALL, JR.

No. 78-1501



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**In the Supreme Court of the United States**

**OCTOBER TERM, 1978**

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**JAMES JEFFERSON McLAIN, ET AL., PETITIONERS**

**v.**

**REAL ESTATE BOARD OF NEW ORLEANS, INC., ET AL.**

---

**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE**

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**BRIEF FOR THE UNITED STATES  
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**QUESTION PRESENTED**

Whether the real estate brokerage business is outside the reach of the Sherman Act.

**INTEREST OF THE UNITED STATES**

The United States is principally responsible for the enforcement of the Sherman Act, 15 U.S.C. 1 and 2. The question presented by this case will have an effect on that enforcement responsibility. For example, in a criminal case brought by the United States a question concerning the extent to which brokerage activities involve interstate commerce arose and was resolved in favor of the coverage of the Act. See *United States v. Foley*, Nos. 78-5013 to 78-5019 (4th Cir. Apr. 19, 1979), pets. for cert. pending, Nos. 78-1737 and 78-1838.



The United States also administers programs to insure home mortgages, and it regulates the lending institutions that make mortgage loans. These programs may be affected by anticompetitive activity of real estate brokers. Moreover, Section 806 of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3606, prohibits discrimination by brokers in the showing and sale of homes. The constitutionality of this statute, to the extent it rests on Congress' power to regulate interstate commerce, could be affected by the Court's decision in this case.

#### STATEMENT

Petitioners have bought or sold houses in the greater New Orleans area through the services of respondent real estate brokers. Petitioners seek to represent the class of house buyers and sellers. They contend that respondents conspired to fix, raise and stabilize the price of their brokerage services and to inflate the price of real estate (Pet. App. 9a-11a).<sup>1</sup> The district court never addressed either the merits of the complaint or the question of class certification. It instead dismissed the complaint because, in its view, the activities of the brokers do not occur in or affect interstate commerce (Pet. App. 17a-23a).

Petitioners' complaint alleged that respondents assist purchasers and sellers "of thousands of parcels of real estate in [the] Greater New Orleans [area] each year;" that many persons use respondents' services in "moving into and out of the Greater New Orleans area;" and that respondents help their clients secure financing and insurance, much of which is "obtained from sources outside the State of Louisiana and moves into interstate

<sup>1</sup>Petitioners also seek to have a class of brokers certified as defendants (Pet. App. 7a-8a).

commerce into the State of Louisiana through the activities of the defendants" (Pet. App. 8a-9a). The district court held that these allegations, even if proven, would not establish that respondents' activities have an effect on commerce. The court rejected as a matter of law petitioners' assertion that the movement of respondents' clients across state lines establishes that the Sherman Act applies to respondents (Pet. App. 18a n.2).<sup>2</sup> The court reasoned (*id.* at 18a) that an effect on commerce could be found only if respondents' role in securing financing and title insurance for their clients was just like the role of lawyers, which was examined in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). On the basis of discovery directed to the brokers' role in securing home financing and title insurance for their clients, the court held that their assistance is "incidental" rather than "integral" to the financing process and therefore insufficient to show an effect on commerce (Pet. App. 20a-23a).

<sup>2</sup>Petitioners offered to prove that brokers "routinely and consistently do business with one or more parties located outside the State of Louisiana" (R. 163), that respondents "actively solicit the business of out-of-state buyers and sellers" (*ibid.*), that such solicitation is partially accomplished by membership in national relocation services headquartered outside the state (*ibid.*), and that interstate channels of communication are used in the course of soliciting and servicing both local and out-of-state clients (R. 163-164). ("R." refers to the record in the court of appeals.) The district court's ruling prevented further discovery on these issues (Pet. App. 17a-18a).

The court also disregarded respondents' fee-sharing arrangements with out-of-state brokers, finding them irrelevant to a charge of local price-fixing (Pet. App. 19a n.3).

The court of appeals affirmed, holding that real estate brokerage is "entirely local in character" and that "[r]eal property is itself the quintessential local product" (Pet. App. 27a). The court noted that although allegations of "substantial" or "appreciable" realty sales to out-of-state clients might establish the necessary effects on commerce, the allegation of "many" such sales would not (Pet. App. 28a & n.2). The court distinguished *Goldfarb*, holding (*id.* at 35a):

unlike the attorneys in *Goldfarb* whose participation in title insurance was statutorily mandated, real estate brokers are neither necessary nor integral participants in the "interstate aspects" of realty financing and insurance.

The court relied on *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), for the proposition that commercial activities that do not "inherently comprehend the interstate aspects of their business" are not covered by the Sherman Act (Pet. App. 37a).

#### SUMMARY OF ARGUMENT

The Sherman Act exercises all of the power Congress possesses over interstate commerce. That power is broad indeed. It reaches farmers who grow wheat to bake their own bread, because otherwise the farmers would buy wheat from elsewhere. It reaches the seating arrangements of small, family-owned restaurants, because they sometimes serve interstate travellers with food that comes from out of state. And it reaches the activities of real estate brokers.

Brokers solicit and serve customers moving from one state to another. They transact business with interstate referral services. They share commissions across state

borders. The product with which they deal is financed through an interstate lending market. The loans are guaranteed by the federal government. An increase in the price of commissions and the real estate itself will reverberate through these channels of interstate commerce. It will influence how many people move, how much they pay, who loans money (and how much), and how great a risk the United States assumes through its guarantees. And the commerce at issue is substantial—billions of dollars of federally-guaranteed loans, millions of state-to-state moves yearly, billions of dollars of funds supplied through interstate loans.

It may be that New Orleans brokers affect only a small part of this interstate commerce. But if interstate commerce is at stake in the industry as a whole, Congress possesses a commerce power over the entire industry. And because the Sherman Act expresses the entire commerce power, it applies to the activities of respondents.

At all events, petitioners should have been given an opportunity to prove at trial their allegations concerning the nature and extent of interstate commerce. An antitrust complaint should not be dismissed unless it is clear beyond doubt that the plaintiff cannot prove that the activities of the defendants affected interstate commerce. It is not possible to say that the jurisdictional allegations of the complaint are frivolous; in other cases, after trial, plaintiffs have proved to the satisfaction of judges and juries that conspiracies among real estate brokers affected interstate commerce.



## ARGUMENT.

### THE ACTIVITIES OF REAL ESTATE BROKERS ARE WITHIN THE COVERAGE OF THE SHERMAN ACT

#### A. THE SHERMAN ACT COVERS ALL ACTIVITIES WITHIN THE SCOPE OF THE COMMERCE POWER

The Sherman Act applies to all activities within Congress' power under the Commerce Clause. "Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed." *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932). "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly arguments \* \* \*." *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944). The Court has thus "permitted the reach of the Sherman Act to expand along with expanding notions of congressional power." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 n.2 (1976).

Because the Sherman Act exercises all of the power Congress possesses, the court of appeals' holding that the statute does not apply to real estate brokers amounts to a holding that Congress has no power whatever to legislate with respect to the activities of brokers. The court of appeals acknowledged as much (Pet. App. 41a-42a). As we show below, however, the United States possesses legislative authority with respect to such activities.

#### B. BROKERAGE SERVICES ARE WITHIN THE SCOPE OF THE COMMERCE POWER

The Court frequently has held that "wholly local business restraints can produce the effects condemned by the Sherman Act." *United States v. Employing Plasterers Association*, 347 U.S. 186, 189 (1954). This is so because "even if \* \* \* activity be local and \* \* \* not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

The power Congress possesses under the Commerce Clause is substantial. It reaches the farmer who grows wheat and bakes his own bread, because even this wholly intrastate activity can affect interstate commerce. If the farmer did not grow his own wheat, he would buy bread in interstate commerce.<sup>3</sup> It reaches every local loan made by loansharks, because loansharks compete with interstate lenders and provide money for interstate crime.<sup>4</sup> It reaches regulation of the price of intrastate milk sales, because those sales affect the price of interstate sales.<sup>5</sup> It reaches the local employment practices of employers whose goods later are shipped interstate.<sup>6</sup> It reaches the

<sup>3</sup>*Wickard v. Filburn*, *supra*.

<sup>4</sup>*Perez v. United States*, 402 U.S. 146 (1971).

<sup>5</sup>*United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942).

<sup>6</sup>*United States v. Darby*, 312 U.S. 100 (1941). Cf. *United States v. Sullivan*, 332 U.S. 689 (1948) (commerce power allows Congress to prohibit relabeling of drugs after interstate shipment); *Scarborough v. United States*, 431 U.S. 563 (1977) (commerce power allows Congress to forbid felons to possess guns that ever have travelled interstate).

service of small family-owned restaurants and motels, because they may obtain food from out of state or serve interstate travellers.<sup>7</sup> And once a class of endeavors is found to affect commerce, Congress can regulate all of the activities of that class, even activities that do not separately affect commerce.<sup>8</sup> Consequently, it is not necessary to show, in order to invoke the commerce power, that a particular conspiracy has identifiable effects on interstate commerce. It is enough to show that the conspiracy takes place in an industry that affects commerce through its total activities.

The power of Congress reaches liquor wholesalers in Oklahoma who divide markets by territories and brands. It does so because territorial divisions reduce competition, because reduced competition leads to increased prices, and because increased prices lead to reduced sales, thus affecting the amount of commerce that crosses the borders of Oklahoma. *Burke v. Ford*, 389 U.S. 320, 322 (1967). The power of Congress extends to the intrastate fixing of attorneys' fees, because attorneys' services are related to the procuring of mortgage loans, and many mortgage loans are procured through interstate commerce. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-785 (1975). The power of Congress extends to attempts to monopolize intrastate provision of hospital services, because hospitals buy drugs through the channels of interstate commerce. *Hospital Building Co. v. Trustees of Rex Hospital*, *supra*.

<sup>7</sup>*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>8</sup>*Perez v. United States*, *supra* (\$2,000 loan); *Wickard v. Filburn*, *supra*, 317 U.S. at 127-128 (one farmer's wheat).

The power of Congress likewise extends to the fixing of brokers' commissions and the manipulation of the price of real estate in and near New Orleans. Real estate brokers have substantial effects on the national economy. They earn approximately \$15 billion in commissions each year.<sup>9</sup> The overwhelming majority of house sales take place through the auspices of brokers, and the costs of brokerage thus are felt in almost all sales.<sup>10</sup> There are several large franchisors of real estate firms with affiliates in more than one state.<sup>11</sup> And because Americans are a mobile people, what brokers do affects the millions of people who move from one state to another and buy houses in the process.<sup>12</sup> The services of brokers are vital to these persons, because they have limited information concerning local markets. Brokers recognize this fact; they

<sup>9</sup>L. Minard, *Real Estate: Why George Babbitt Should be Smiling in his Grave*, *FORBES* 41 (Sept. 4, 1978).

<sup>10</sup>The National Association of Realtors (of which respondent Board is a part) has stated that "[f]or most people, the acquisition of real estate \* \* \* requires professional assistance" by brokers. National Association of Realtors, *Supplemental Operations Manual* 1978 at 13. The need obviously is greatest for persons moving from state to state, for they have the least opportunity to learn about market conditions and offers to sell. They need a local agent familiar with the market.

<sup>11</sup>See Minard, *supra*, at 42. On such firm, Century 21, has 6,039 affiliates in 48 states. Each affiliate pays a percentage of its revenues to a regional office, and each regional office in turn pays a percentage of its revenues to the home office.

<sup>12</sup>Between 1970 and 1975, approximately 8.6% of the population of the United States (and 11.5% of the population of the Southern states) moved from one state to another. Bureau of the Census, Current Population Reports, *Mobility of the Population of the United States March 1970 to March 1975* at 61 (Series P-20, No. 285, 1975). Another 7.2% (5.5% in Southern states) moved into the United States from abroad between 1970 and 1975. (This figure also includes persons whose 1970 residence is unknown to the Census Bureau.) These data mean that at least three million, and perhaps as many as six million, people move into a new state every year, and the data probably understate the amount of movement because some people moved more than once during the five-year period.



advertise in out-of-state media and participate in national relocation services.<sup>13</sup> These services refer customers across state lines; commissions are divided across state lines. Several courts have held that these considerations subject brokers to the commerce power of the United States. *United States v. Foley*, Nos. 78-5013 to 78-5019 (4th Cir. Apr. 19, 1979), pets. for cert. pending, Nos. 78-1737 and 78-1838; *United States v. Harding*, 563 F. 2d 299, 302 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States v. Greater Syracuse Board of Realtors, Inc.*, 449 F. Supp. 887, 894-898 (N.D.N.Y. 1978).

But this is not all. The activities of brokers are intimately related to interstate commerce because much of the money that is used for mortgage loans crosses state lines, and additional sums are guaranteed by the United States.<sup>14</sup> See *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at 783. Cf. *Marquette National Bank v. First of Omaha Service Corp.*, No. 77-1265 (Dec. 18, 1978), slip op. 14-19. A conspiracy to increase commissions will increase the price of housing and thus will increase the amount of money borrowed. An increase in the amount

<sup>13</sup>See Minard, *supra*, at 42. The revenues of firms specializing in relocation services exceed \$125 million yearly.

<sup>14</sup>Mortgage loans are used to finance approximately 90% of all sales of housing. Department of Housing and Urban Development, *Tenth Annual Report on the National Housing Goal 89* (1979). The United States guarantees many of these loans through a variety of programs (see Pet. App. 22a n.4; *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at 783). In 1977 the total mortgage debt on nonfarm homes for one to four families was some \$650.4 billion. Approximately \$141.7 billion of this was guaranteed by one or another federal agency. Department of Housing and Urban Development, *1977 Statistical Yearbook* 377. The United States also regulates the institutions that make the loans.

borrowed will affect the flow of commerce and also will increase the risk to which the United States is exposed through its guarantees. Moreover, if—as had been alleged here (Pet. App. 9a-11a)—the brokers also conspire to increase the price of the real estate itself, this agreement has an obvious and direct effect on borrowing. Some buyers will be priced out of the market; then the flow of commerce will be stopped. Other buyers will pay the higher prices; they will borrow more. Either way, interstate commerce is affected. The effect is even stronger when the buyers involved come from out of state.

Brokers do not simply stand by while financing is obtained.<sup>15</sup> Brokers exist to provide information and services. They mediate sales; they do not sell the houses (the owners do that) but sell their services. They can compete to provide additional or better services and thus to make themselves attractive to buyers and sellers of houses. One of these services, which many brokers offer, is assistance in obtaining mortgage money and title insurance.<sup>16</sup> See *United States v. Foley*, *supra*, slip op. 12-13; *United States v. Greater Syracuse Board of Realtors, Inc.*, *supra*, 449 F. Supp. at 895-896.<sup>17</sup> It may be, as the

<sup>15</sup>Under the Commerce Clause, however, it makes no difference whether brokers participate in the financing, so long as their activities have an effect on the flow of commerce in that market. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Association*, 336 U.S. 460, 464 (1949).

<sup>16</sup>Title insurance often is obtained from out-of-state insurers.

<sup>17</sup>See also F. Case, *Real Estate Brokerage* 158 (1965). Some state laws define aid in obtaining financing as an aspect of the brokers' tasks. See e.g., Cal. Bus. & Prof. Code §§ 10131-10131.2 (West 1964).

court of appeals said, that brokers are not required to perform this service in order to earn their commissions (Pet. App. 35a)—although many contracts to buy are conditioned on the availability of financing, and brokers do not earn their commissions until all the conditions of a contract have been fulfilled (see Pet. App. 22a; Doc. No. 60, Exh. No. 1). But whether brokers must perform any particular service is not the question. That they do offer a service is the point, because their services as a whole affect interstate commerce.

In sum, real estate brokers solicit and serve customers who move from one state to another. They transact business with interstate referral services. They share commissions across state borders. The product with which they deal is financed through an interstate lending market. The financing is guaranteed by the federal government. The brokers take an active role in obtaining financing. And the commerce they affect is substantial—billions of dollars of federally-guaranteed loans, millions of state-to-state moves yearly, billions of dollars of loan funds supplied by out-of-state lenders. Under any test, a substantial amount of interstate commerce is affected.<sup>18</sup> Congress thus has the power, under the Commerce Clause, to regulate the affairs of real estate brokers. And because the Sherman Act expresses all the power Congress possesses, it applies to the market in realty services.

<sup>18</sup>A loan of \$200,000 is "not insubstantial" for purposes of antitrust analysis. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501-502 (1969).

C. THE ALLEGATIONS OF THE COMPLAINT  
IN THIS CASE WERE SUFFICIENT TO ENTITLE  
THE PLAINTIFFS TO A TRIAL ON THE  
QUESTION WHETHER BROKERAGE SERVICES  
AFFECT COMMERCE

If the Court agrees with the approach we have used above, the question whether petitioners can prove at trial (or on a motion for summary judgment) that the New Orleans brokers affected commerce in a particular fashion is irrelevant. The effect on commerce can be found in the nature of the business, just as the Court found effects on commerce in the nature of the liquor business in *Burke v. Ford*, *supra*. The question whether the Commerce Clause gives Congress power to legislate with respect to a particular industry ordinarily should not be the subject of a trial. If it were, the scope of constitutional power might depend on the ingenuity of counsel or the credibility of witnesses. It is unlikely that Congress has the power to regulate brokers in Syracuse but not in New Orleans, with the difference depending on whether the plaintiffs made the right offer of proof. Cf. *Vance v. Bradley*, No. 77-1254 (Feb. 22, 1979), slip op. 17-18.

Even if the extent of power under the Commerce Clause turns on what the plaintiffs are able to prove in a particular case about the nature of the business, petitioners satisfied their obligation here. They alleged that many out-of-state buyers use respondents' services (one petitioner moved into Louisiana from out of state using respondents' services, see R. 121) and that respondents assist their clients in obtaining financing and title insurance, much of which comes from out of state (Pet. App. 9a). They contended that respondents belong to interstate relocation services (R. 163); they discovered that respondents paid fees for out-of-state referrals (Doc. No. 60 at 32) advertised the nationwide reach of their



services (Doc. No. 61 at 60-61), and divided commissions with out-of-state brokers (Doc. No. 61 at 32). In holding that proof of these allegations would be insufficient as a matter of law, the courts in this case erred. A conspiracy that increases the fees and the price of the real estate will affect the number of purchasers and the amount and type of interstate activity. See *United States v. Foley, supra*; *United States v. Greater Syracuse Board of Realtors, Inc., supra*, 449 F. Supp. at 895; *Mortensen v. First Federal Savings & Loan Association*, 549 F. 2d 884 (3d Cir. 1977). It also will affect the interstate divisions of commissions.

The district court restricted "further discovery" to the question whether the brokers assist in obtaining financing and title insurance (Pet. App. 18a-19a). This precluded any reliance on the use of services by out-of-state customers (see *id.* at 18a n.2) and on the inevitable effects of changes in price on the amount of interstate commerce (see pages 10-11, *supra*).<sup>19</sup> But even on the lower courts' view of what was required to show an effect on interstate commerce, they erred in dismissing the case.

The district court and the court of appeals essentially looked to state law and practice to determine whether the services of brokers are *necessary* to the process of obtaining loans and title insurance. This, they said, was appropriate under the approach of *Goldfarb v. Virginia State Bar, supra*, which found that the fixing of attorneys' fees has an effect on commerce because attorneys' services are necessary to the obtaining of mortgage loans and title insurance. But the Court did not hold in *Goldfarb* that the

<sup>19</sup>For example, petitioners tried to determine whether respondents engaged in out-of-state advertising (R. 352). Respondents objected to the interrogatory asking for this information and did not answer it (R. 411-413). The district court dismissed the action without compelling respondents to answer.

proof of the necessary relationship between attorneys' services and loans is the only way to show an effect on commerce. It held, instead, that proof of such a relationship is a sufficient way to show an effect on commerce. The Court did not exclude the possibility that the existence of effects on interstate commerce could be demonstrated in other ways.

The approach used by the courts in this case overlooks the nature of the analysis used in *Burke, Goldfarb, Hospital Building*, and similar cases. A conspiracy to fix commission rates and the prices of the houses themselves could substantially increase the cost to the buyers, thus affecting the amount of interstate movement and the amount of interstate financing "as a matter of practical economics." *Hospital Building Co. v. Trustees of Rex Hospital, supra*, 425 U.S. at 745 (footnote omitted). No economic theory predicts that an increase in cost leaves the quantity supplied unaffected. Cf. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, No. 77-1578 (Apr. 17, 1979), slip op. 17. And even if the effect of an increase in price were not obvious,<sup>20</sup> a court should not dismiss the complaint. As the Court held in *Hospital Building Co. v. Trustees of Rex Hospital, supra*, 425 U.S. at 746-747, the court should allow the plaintiff an opportunity to prove his allegations at trial. As is true in other parts of the law, a court should not dismiss an antitrust case for want of subject matter jurisdiction unless the jurisdictional allegations are frivolous.<sup>21</sup> It is not possible to characterize as frivolous petitioners' allegation that the activities of the brokers affect commerce.

<sup>20</sup>*Burke v. Ford, supra*, appears to hold that a court may take judicial notice that an increase in price leads to reduced purchases.

<sup>21</sup>See *Bell v. Hood*, 327 U.S. 678, 682-683 (1946); 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3564 (1975).

The court of appeals' apparent belief (Pet. App. 34a-37a) that the complaint is insufficient because the effects on commerce of brokers' activities are "incidental" rather than "direct" also is inadequate to support its decision. The court of appeals relied in this regard on *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). But *Yellow Cab* was decided at a time when the Court examined a case to determine whether the alleged restraint took place "in commerce." Not until *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), did the Court hold that the Sherman Act also prohibits restraints "affecting commerce." Whatever role the incidental-direct dichotomy may play in determining whether something occurs "in" commerce, it plays no role at all in determining whether activities "affect" commerce. See *Wickard v. Filburn*, *supra*; *Perez v. United States*, 402 U.S. 146 (1971). The approach of *Yellow Cab*, if still vital,<sup>22</sup> thus is irrelevant here, because the restraint of trade in brokerage services is alleged to "affect" interstate commerce.

<sup>22</sup>The Court construed *Yellow Cab* narrowly in *Goldfarb* (see 421 U.S. at 748 n.13). Then it stated in *Hospital Building Co.* that the indirect nature of an effect "does not lead to a conclusion that the conduct at issue is outside the scope of the Sherman Act" (425 U.S. at 744). See also I P. Areeda & D. Turner, *Antitrust Law* para. 232d (1978).

# CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1979

DOJ-1979-06



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

**No. 78-1501**

**JAMES JEFFERSON McLAIN, ET AL.,**  
versus *Petitioners.*

**REAL ESTATE BOARD OF NEW ORLEANS, INC., ET AL.,**  
*Respondents.*

**MOTION FOR LEAVE TO FILE A BRIEF  
AMICUS CURIAE AND BRIEF OF AMICUS CURIAE  
CONSUMERS UNION OF UNITED STATES, INC.,  
IN SUPPORT OF PETITIONERS**

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REAL ESTATE BOARD OF NEW  
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*Respondents.*

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**MOTION OF CONSUMERS UNION OF UNITED  
STATES, INC., FOR LEAVE TO FILE A BRIEF  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

Consumers Union of United States, Inc. ("Consumers Union") hereby moves the Court, pursuant to Rule 24, for leave to file the accompanying brief *amicus curiae* in support of the petitioners. Although petitioners consented to the filing of this brief, respondents have refused to give their consent.

**Interest of Amicus Curiae**

Consumers Union is a nonprofit, membership organization chartered in 1936 to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union publishes *Consumer Reports*, a monthly magazine with a circulation of over 2 million, which regularly carries articles, *inter alia*, on consumer services, marketplace economics and judicial



actions that affect consumer welfare. Over 20,000 residents of Louisiana subscribe to *Consumer Reports*.

Consumers Union has approximately 235,000 members who live throughout the United States, including Louisiana. Many buy and sell homes using the services of a real estate broker.

On January 12, 1979, Consumers Union petitioned the California Real Estate Commission to end industry-wide fixing of real estate brokers' commissions in California. Consumers Union estimates that each year such price fixing costs Californians alone an estimated \$1.5 billion in excess fees, or an average overcharge of \$1,783 on the sale of a home. The petition requested the Real Estate Commissioner to remove barriers to competition among California brokers by preventing brokers and industry associations from fixing fees, by investigating and taking disciplinary action against brokers who engage in anti-competitive acts or practices, and by informing consumers of their rights to negotiate commissions.

#### Facts and Questions Presented By Amicus

*Amicus*, in its brief, presents facts and questions of law that are not otherwise adequately addressed by the parties to this case and that are relevant to the Court's disposition of this case. *Amicus* provides a national perspective; describes evidence of widespread price fixing and discusses the far ranging implications of the Court's decision in this case. If this Court finds that brokers in New Orleans can fix fees with impunity from the Sherman Act, similarly situated local brokers will be able to fix fees throughout the nation with similar impunity. *Amicus* documents that widespread local fee fixing by real estate brokers would substantially effect interstate primary and secondary mortgage markets,

growing interstate real estate franchises and referral networks, and the American economy.

*Amicus* also presents evidence showing that brokers are dependent on interstate financing to earn the commissions they fix through anticompetitive practices. That dependency establishes that price fixing is so inseparable from interstate commerce as to be within the reach of the Sherman Act.

The facts and legal arguments presented by *amicus* should assist this Court to decide if the impact of local price fixing on interstate commerce is substantial, and if fixing of commissions is inseparable from interstate commerce and thus encompassed by the Sherman Act. Since the information and arguments presented by *amicus* will not otherwise be brought to the attention of this Court, *amicus'* request for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

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**No. 78-1501**

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JAMES JEFFERSON McLAIN, *ET AL.*,  
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REAL ESTATE BOARD OF NEW  
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**MOTION FOR LEAVE TO FILE A BRIEF  
AMICUS CURIAE AND BRIEF OF AMICUS CURIAE  
CONSUMERS UNION OF UNITED STATES, INC.,  
IN SUPPORT OF PETITIONERS**

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**AMICUS CURIAE BRIEF**

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**Interest of Amicus Curiae**

The interest of *amicus curiae* Consumers Union of United States, Inc. in this case is set forth in the accompanying motion for leave to file this brief.

**Issue**

Does price fixing by real estate brokers have a sufficient effect on interstate commerce to be subject to the Sherman Act?



## Argument

### I. Introduction

Throughout the nation, real estate brokers' commissions are set, with remarkable uniformity, at either 6 or 7 percent, regardless of the skill of the broker or the difficulty of selling a particular home.<sup>1</sup> This extraordinary uniformity is rooted in a long history of price fixing by the real estate industry.<sup>2</sup> For many years, local real estate boards published fee schedules which set broker commissions at 6 percent.<sup>3</sup>

<sup>1</sup> Minard, *Why George Babbitt Should Be Smiling In His Grave*, *Forbes*, September 4, 1978, at 44. Three groups have examined independently the California real estate industry and concluded that commission rates are presently fixed at a non-competitive level of 6 percent. B.M. Owen & J. Grundfest, *Licensing of Real Estate Brokers as Underwritten Title Insurance Agency* (Stanford University 1976) (75% of all real estate transactions in California involved a broker's commission of exactly 6%); California Citizen Action Group & California Public Interest Research Group, *Survey of Real Estate Brokerage Commissions* (November 18, 1977) (of brokers surveyed, 97% in Sacramento, 92% in San Francisco and 84% in Los Angeles charged commissions of exactly 6%); Office of the San Diego District Attorney, *Survey of Real Estate Brokerage Commissions* (October 2, 1975) (92.2% of properties listed in San Diego involved a 6% commission).

<sup>2</sup> In a normal competitive market, charges would reflect the ability and experience of the broker, the difficulty of selling a particular house and the cost of doing business for a particular broker.

<sup>3</sup> *F. Case, Real Estate Brokerage* 179 (1965). "Offices normally follow the commission schedules recommended by the local real estate boards. . . . Cutting commissions for any reason is usually discouraged. . . . A firm statement that the commission will be based on a printed schedule will usually discourage buyers and sellers from asking for cuts in the rate"; E. Boyce, *Real Estate Characteristics and Brokerage Operations in Connecticut* 235 (1969) ("Real estate boards in nearly all communities prescribe the rates to be charged by the broker members in various transactions.")

In 1950, those fee schedules were found by the Supreme Court to violate the Sherman Act. *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950). Despite this decision, the fixing of commissions at 6 percent persists throughout the real estate industry. Brokers with price fixing arrangements may police colleagues by consulting the multiple listing services ("MLS"). MLS lists information on homes available for sale in a locality, including the commission charged by each broker for each sale.

Anticompetitive forces that maintain commissions at artificially high levels are being examined by the Federal Trade Commission, in a recently launched nationwide investigation. The ability of the FTC and consumers to use the Sherman Act to combat restraints on competition between brokers is at issue in this case.<sup>4</sup> Thus, this Court's decision has implications that extend far beyond New Orleans to real estate sales throughout the United States.

### II. Summary of Argument

A. The unusual uniformity of real estate broker commissions implies widespread price fixing. If brokers in New Orleans can fix their commissions without violating the Sherman Act, so can similarly situated brokers throughout the nation. Widespread local price fixing would so substantially affect interstate financial markets and the American economy that the federal antitrust laws apply to price fixing in each locale.

B. The earning of a brokerage commission is entirely dependent on interstate mortgage funds and, therefore, is in-

<sup>4</sup> The Federal Trade Commission's regulatory authority extends to "unfair methods of competition in or affecting commerce." 15 U.S.C. Section 45(a)(6).



separable from and integral to interstate commerce and encompassed by the Sherman Act.

C. Massive local price fixing would also substantially affect the growing interstate network of real estate franchises and referral services and, therefore, falls within the reach of the Sherman Act.

### III. Scope of The Sherman Act.

The Sherman Act applies to all activities Congress may regulate under the Commerce Clause, *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 432 (1932); *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944), unless Congress specifies otherwise. And Congressional authority under the Clause is broad. Congress may regulate a wholly local activity if it "exerts a substantial economic effect on interstate commerce . . . irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'." *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Congress can regulate an individual whose effect on interstate commerce is trivial, if "his contribution taken together with that of many others similarly situated, is far from trivial." *Wickard v. Filburn*, *supra* at 127-8.

This Court has found that the commerce clause reaches a wheat farmer who grows a small acreage of wheat for use on his farm, when the actions of this farmer, together with other farmers similarly situated, has a substantial impact on the interstate sale of wheat. *Wickard v. Filburn*, *supra*. Similarly, a small restaurant owner whose racial discrimination has an insignificant impact on interstate commerce falls within the commerce clause when the collective impact on interstate commerce of racial discrimination by restaurants

is significant. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). And, local milk producers who sell milk only in intrastate markets are subject to federal regulation when their composite impact on interstate milk sales is substantial. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942). See also *Perez v. United States*, 402 U.S. 146 (1971).

Although each of these cases involved federal laws designed to apply to the specific intrastate activity before the Court, together they define of the boundary of Congressional authority under the Commerce Clause. By doing so, they determine the reach of the Sherman Act, which extends to all acts Congress may regulate under the Commerce Clause. *Atlantic Cleaners & Dyers v. United States*, *supra*; *United States v. South-Eastern Underwriters Association*, *supra*.<sup>5</sup>

### IV. The Sherman Act Applies To Local Brokers Who Have A Substantial Composite Effect on Interstate Commerce.

Judicial sanctioning of fee fixing in New Orleans could permit brokers throughout the nation to fix their fees with impunity from the Sherman Act. Widespread local price fixing would so substantially affect interstate financial markets that the federal antitrust laws apply to price fixing in each locale.

Real estate brokerage is a large industry, which has grown dramatically in dollar volume with the rapid increase in housing prices. Since commissions are a percentage of

<sup>5</sup> The reach of the Sherman Act has "expand[ed] along with expanding notions of congressional power." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 744 n.2 (1976).

the sale price of a home, brokerage commissions rise in direct proportion to housing price increases. Nationwide, the price of the average home has nearly tripled in the past ten years, and nearly doubled in the past four years alone.<sup>6</sup> The volume of real estate transactions has soared from \$48 billion in 1968 to \$267.7 billion in 1978.<sup>7</sup> Real estate commissions consequently rose to nearly \$15 billion in 1978.<sup>8</sup>

Commissions naturally increase the sales price of homes, since sellers pay the commissions and pass their costs on to buyers as part of the sale price.<sup>9</sup> The cost to consumers of this increase is multiplied when financed over 20 to 30 years as part of the mortgage on a house. With mortgage interest rates at 10 percent, the added cost attributable to artificially high commissions is tripled when financed over 30 years. Thus, fixed commissions can significantly affect mortgage markets, which operate interstate. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).<sup>10</sup>

<sup>6</sup> The average price of an existing home was \$22,300 in 1968, \$35,800 in 1974 and \$55,500 in 1978. National Association of Realtors, Existing Homes Sales 1978 (1979), at 37.

<sup>7</sup> *Ibid.* at 36.

<sup>8</sup> See Minard, *supra* note 1, at 41.

<sup>9</sup> See Owen, Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate Markets, 29 Stanford L. Rev. 931 (1977).

<sup>10</sup> Petitioners' complaint alleges that respondents help their clients to secure financing, much of which is "obtained from sources outside the State of Louisiana and move[s] in interstate commerce into the State of Louisiana through the activities of the defendants." (Pet. App. 9a).

That effect reverberates through the secondary mortgage market, an interstate market in which outstanding mortgages are sold.<sup>11</sup> Sales in the secondary mortgage market are made primarily to out-of-state federally backed buyers who transfer funds to in-state lenders by purchasing mortgages.<sup>12</sup> Those purchases increase available mortgage funds in the state and transfer funds from areas of credit surplus to areas of credit deficit.<sup>13</sup> Mortgage funds thus are transferred among the states, including Louisiana, through the secondary mortgage market. The Federal National Mortgage Association ("FNMA" or, as popularly known, "Fannie Mae") alone purchased mortgages originated in Louisiana amounting to \$97,947,300 in 1975 and \$107,910,400 between January and September of 1976.<sup>14</sup> Local price fixing through-

<sup>11</sup> Between 1970 and 1975, the secondary mortgage market for loans on 1-4 family homes was approximately one-third the size of the primary market. Department of Housing and Urban Development, The Supply of Mortgage Credit 1970-1974 48 (1975).

<sup>12</sup> The Department of Housing and Urban Development reports that: "the secondary market for home mortgage loans has become heavily Federalized, comprised largely of mortgage buyers backed in one way or another by the U.S. Government." Department of Housing and Urban Development, The Supply of Mortgage Credit 1970-1974 55 (1975). Federal credit agencies and federally sponsored pools purchased \$42 billion, or a market share of 68 percent, of the secondary mortgage market in 1978. Department of Housing and Urban Development, Mortgage Gross Flow, HUD News (March 22, 1979), at 2.

<sup>13</sup> See O. Jones & L. Grebler, The Secondary Mortgage Market, Its Purpose, Performance and Potential 27-52 (1961).

<sup>14</sup> Federal National Mortgage Association: Single Family Mortgages Added to Portfolio - Year to Date, January to June 1976; Hearings on Secondary Market Operations of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation Before the Comm. on Banking, Housing & Urban Affairs, 94th Cong., 2d Sess. 453, 456, 459 (1976).



out the nation would have a substantial impact on these primary and secondary mortgage markets and, therefore, is encompassed by the Sherman Act.

V. *Interstate Mortgage Financing is Inseparable From and Integral To The Earning Of a Broker's Commission.*

From the reverse perspective, financing supplied by the secondary and primary mortgage markets enables brokers to earn commissions. Brokers are not entitled to any commission, under law, until financing is procured by the home buyer. Sellers' brokers do not earn a commission until they produce a "ready, willing, and able" buyer, that is, a buyer who has financing to purchase the house.<sup>15</sup> The vast majority of buyers become "able" by obtaining mortgage financing that flows interstate.<sup>16</sup> This interstate financing permits brokers for sellers to earn commissions. Buyers' brokers also depend on that interstate commerce since they, too, are not entitled to a commission until their client obtains financing (and purchases a residence).

Brokers' dependence on interstate funds to earn commissions subjects the fixing of those commissions to the Sherman Act. As held in *United States v. Frankfort Distilleries*, 324 U.S. 293, 297 (1945):

... there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states.

<sup>15</sup> *Morere v. Dixon Real Estate Co.*, 188 So.2d 623 (La. App. 1966), *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967).

<sup>16</sup> Department of Housing and Urban Development, Tenth Annual Report on the National Housing Goal 89 (1979).

This Court long has held that, although the former does not fall within the Sherman Act, the latter does. *Goldfarb v. Virginia State Bar*, *supra* at 785, citing *United States v. Frankfort Distilleries*, *supra*. In *Goldfarb*, title examinations were found to be an integral part of interstate commerce because needed, as a practical matter, to acquire title insurance and mortgage financing. With broker commissions, interstate commerce is needed, as a practical matter, for local brokerage to exist. Thus, brokerage is "an inseparable element of" and "dependent for its success upon" interstate financial markets, *United States v. Frankfort Distilleries*, *supra* and, therefore, encompassed by the Sherman Act.

VI. *Massive Local Price Fixing Would Affect the American Economy.*

If local brokers may fix their commissions, housing prices will rise and that anticompetitive conduct will be felt throughout the national economy. Housing prices are a major component of the consumer price index, which is used widely to determine salary increases and to arrive at a multitude of government economic-related decisions.<sup>17</sup> To the extent that fees are fixed by brokers, this not only increases housing prices, but also affects the consumer price

<sup>17</sup> The cost of home purchases constitutes 10.166 percent of the consumer price index. U.S. Department of Labor, Bureau of Labor Statistics, CPI Detailed Report 7 (April 1979). That index determines salary increases for 5.8 million or 60 percent of the 9.6 million workers who are covered by major collective bargaining agreements. V. Sheifer, Cost of Living Adjustment: Keeping Up With Inflation, Monthly Labor Review (Bureau of Labor Statistics June 1979), at 14. Social Security, food stamp and various other government benefit programs are also indexed to the Consumer Price Index. B. Torrey, E. Morrison & D. Johnson, Automatic Cost of Living Increases in Federal Programs (Office of Management and Budget July 30, 1975).



index, affects salary increases throughout the nation and redirects numerous economic decisions. The breadth of this impact draws such price fixing within the jurisdiction of the Commerce Clause.

VII. *Price Fixing Has a Substantial Impact on the Growing Interstate Network of Real Estate Franchises and Referral Services.*

Allowing price fixing by local brokers also would have an enormous impact on the growing interstate network of real estate franchises and referral services. Interstate networks have expanded rapidly to accommodate a substantial migration between states. Interstate moves to new residences dramatically rose ten-fold in the past 10 years. Between 1965 and 1968, only 1.2 million people moved their residences from one state to another; between 1975 and 1978, well over 13 million moved interstate.<sup>18</sup> The real estate industry has responded by establishing over 30 franchise chains, which have sold 10,000 franchises nationwide and account for over \$800 million in gross commissions.<sup>19</sup> The National Association of Realtors reports that "[f]ew developments have swept so rapidly through the real estate

<sup>18</sup> Department of Commerce, Social and Economic Statistics Administration, Mover Households 1 (1970); Department of Commerce, Bureau of the Census, Geographic Mobility: March 1975 to March 1978 6 (1978).

<sup>19</sup> Minard, *supra* note 1, at 42. The five largest national franchises are Better Homes and Gardens Real Estate Service, Century 21 (with 6,039 firms in 48 states, including Louisiana); Electronic Realty Associates (with 1,650 firms in 36 states); Red Carpet Corporation of America (with 1,200 firms in 16 states); and Gallery of Homes (with 758 firms in 49 states).

industry as the advent of franchising."<sup>20</sup> The number of franchises is growing at a rate of more than 30 percent annually to accommodate the rapid growth in interstate moves.<sup>21</sup>

Relocation firms also have expanded in recent years to assist corporate employees to find housing in locales to which they have been transferred. The Employee Relocation Service estimates that large corporations transferred well over 300,000 employees in 1977.<sup>22</sup> *Forbes* estimates that these transferees are worth over \$1 billion in aggregate commission revenue to the more than 20 relocation firms that operate nationwide.<sup>23</sup> Several of these relocation firms do business in Louisiana: Homes for Living Network of St. Louis, Mo.; RELO of Chicago, Ill.; and Home Equity of America of Darien, Connecticut.<sup>24</sup> If local brokers affiliated with this massive and growing interstate real estate network can set fees at artificially high levels, market distortions will be felt throughout these interstate networks. Such

<sup>20</sup> National Association of Realtors, Real Estate Brokerage 1978: Income, Expenses, Profits 15, 39 (1978). The National Association of Realtors found in its 1976-77 survey of NAR members that 22.1 percent were franchise affiliates. Most of these firms had joined franchises very recently; 23.4 percent joined in the last year; 61 percent had been affiliates for three years or less; and 82 percent joined franchises within the past five years.

<sup>21</sup> *Ibid.* at 15.

<sup>22</sup> Minard, *supra* note 1, at 42.

<sup>23</sup> *Ibid.*

<sup>24</sup> See Original Brief on Behalf of Plaintiff-Appellant in the United States Court of Appeals for the Fifth Circuit, at 13.

impact is sufficiently substantial to subject that price fixing to the Sherman Act. *United States v. International Boxing Club of N.Y.*, 348 U.S. 236 (1955).

### Conclusion

The collective impact of local price fixing on housing prices, on interstate primary and secondary mortgage markets, on the growing interstate network of real estate franchises and on the total economy of the United States, is substantial. Furthermore; this local price fixing depends for its success on interstate mortgage financing that enables brokers to earn commissions. The inseparability of this anticompetitive practice from interstate commerce, and its substantial impact on that commerce, brings price fixing by brokers within the reach of the Sherman Act.

Respectfully submitted,

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IN THE  
**Supreme Court of The United States**

OCTOBER TERM, 1979

No. 78-1501

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**JAMES JEFFERSON McLAIN, et al.,**

*Petitioners,*

v.

**REAL ESTATE BOARD OF NEW ORLEANS, INC., et al.,**

*Respondents.*

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On Writ of Certiorari to  
The United States Court of Appeals for  
The Fifth Circuit

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**AMICUS CURIAE BRIEF OF THE  
NATIONAL ASSOCIATION OF REALTORS®**

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IN THE

**Supreme Court of The United States**

OCTOBER TERM, 1979

**No. 78-1501****JAMES JEFFERSON McLAIN, et al.,***Petitioners,*

v.

**REAL ESTATE BOARD OF NEW ORLEANS, INC., et al.,***Respondents.*

On Writ of Certiorari to  
The United States Court of Appeals for  
The Fifth Circuit

AMICUS CURIAE BRIEF OF THE  
NATIONAL ASSOCIATION OF REALTORS®

**QUESTION PRESENTED**

Does Fed.R.Civ.P.12(b)(1) permit a district court to dismiss an action brought under the Sherman Act after ample opportunity for discovery and an evidentiary hearing fail to establish the requisite nexus between the alleged real estate brokerage trade restraint and interstate commerce?



## INTEREST OF THE NATIONAL ASSOCIATION OF REALTORS® (NAR)<sup>1</sup>

*Preliminary.* NAR's interest in this cause is direct, vital and immediate. Founded in 1908 and headquartered in Chicago, NAR is a non-profit professional association of licensed real estate brokers and salespersons engaged in all phases of the real estate business, including, particularly, brokerage, appraising, management, and counseling.

NAR owns various registered service and collective membership marks, including the mark REALTOR®. Over the years NAR has promoted a public understanding of the term REALTOR® as identifying a member of a member Board of the NATIONAL ASSOCIATION OF REALTORS®, engaged in the real estate business on a professional basis and subscribing to and bound by a reasonable and non-discriminatory Code of Ethics.

NAR has been successful in promoting this understanding and, as a consequence, it and its members are the beneficiaries of "good will" which is recognized as extremely valuable by the public and a large number of real estate practitioners.

Because of the value of the term REALTOR® and also because of the many and varied services available from NAR, real estate boards have sought affiliation with NAR as Member Boards of REALTORS®. Affiliation is accomplished by the issuance of a charter by NAR according membership privileges and granting the Board the right to use the term REALTOR® in a specified geographic area in exchange for the Board's agreement to service its members and the public, to enforce the Code of Ethics and to assist in safeguarding the registered marks of NAR.

<sup>1</sup> NAR has filed this *amicus* brief pursuant to the written consent of petitioners and respondents.

Today, NAR's membership includes 50 State Associations of REALTORS®, over 1700 Member Boards of REALTORS®, and approximately 600,000 REALTORS® and REALTOR-ASSOCIATES®.

NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. In pursuit of these objectives, NAR is concerned with a wide range of activities—equal opportunity in housing, real estate licensing, public service neighborhood revitalization, real estate education, home protection, arbitration of member and public controversies and legislation relating to the real estate business.

*The Interest of NAR in This Decision.* Despite the admittedly local nature of real estate (Pet. Brief at 25) and despite petitioners' admitted failure to produce sufficient evidence of the requisite nexus between respondents' brokerage activities and interstate commerce (Pet. at 7), petitioners now contend the trial court erred in dismissing their complaint for lack of subject-matter jurisdiction.

Petitioners' grounds for appeal directly affect the interests of the NAR and its members for the following reasons:

*First*, to postpone until conclusion of trial a district court's determination of Sherman Act subject-matter jurisdiction may needlessly subject over 1700 local real estate boards and more than 600,000 REALTORS®, each with distinct factual situations, to the crushing costs and hardships of a full-blown federal antitrust trial. This concern of NAR and its members regarding the future impact of an adverse decision here is hardly theoretical. Petitioners' attorneys, in their application for an extension of time in which to file their petition [presented to Mr. Jus-



tice Rehnquist (acting as Circuit Justice for the Fifth Circuit) on March 14, 1979, one day in advance of the original March 15 due date in disregard of Supreme Court Rule 34(2)], represented to this Court that, in early January, "*with the concurrence of our clients*, who felt equally unable to support a continuation of this litigation" (emphasis added), they were "inclined to abandon" this litigation. Petitioners' attorneys thereafter "received telephone calls from attorneys involved in anti-trust work throughout the United States. . . . [A]ttorneys from Las Vegas, Washington, D.C., Atlanta and Mobile called" to urge application for the writ. (Application, ¶s XIX—XX).

NAR's over 1700 member boards come in all shapes and sizes, and are located in small, medium and large-size cities, suburbs ("bedroom" communities), towns, rural villages and unincorporated areas. A broadly applicable, adverse ruling based on the meagre facts in the record here would be most unfair and could trigger a flood of litigation, most of which would be brought without any investigation into the factual basis in a particular locality for broad, conclusory restraint of trade and jurisdictional allegations.

. *Second*, the decision will determine the extent to which real estate boards and individual brokers, already governed by state regulations and state antitrust laws, will be subjected to federal antitrust lawsuits.

*Third*, the decision will vitally affect the nature and type of real estate services which will be made available, the manner in which those services will be performed, and the cost of such services if federal antitrust trials are to be continually confronted. Petitioners have made the following representations regarding the role of REALTORS®:

Petitioners respectfully submit that the activities of REALTORS® are necessary to the survival and proper

functioning of local real estate markets. (Pet. Brief at 46)

Further, and in a more general sense, REALTORS®, by bringing together buyer and seller and by assisting in the consummation of the transaction, actually "make" the local market in realty. (Pet. Brief at 47)

In short, REALTORS® "merchandise" homes. If they did not exist, they would have to be invented, or the real estate market would cease to function on a continuing and viable basis. (Pet. Brief at 48)

If petitioners are correct, and REALTORS® are virtually indispensable, then the increased legal costs of having to defend, all the way through trial, class action cases such as the instant case will inevitably be passed on to the consumer in the form of higher commissions.<sup>2</sup>

In actuality, as petitioners make clear (Pet. Brief at 37), of the 50,605 residential real estate transactions across the nation studied in connection with a 1971 joint report of the Department of Housing and Urban Development and

<sup>2</sup> Relevant here is Justice Rehnquist's concurring opinion in *Reiter v. Sonotone Corp.*, 1979-1 Trade Cases ¶ 62,688 (U. S. Sup. Ct., June 11, 1979) that "in the absence of any jurisdictional limit, there is considerable doubt in my mind whether this type of action is indeed ultimately of primary benefit to consumers themselves, who may recover virtually no monetary damages, as opposed to the attorneys for the class, who stand to obtain handsome rewards for their services." We note that petitioners' attorneys are underwriting the expense of preparing and presenting this appeal. (Application, ¶ XXI). We note further that two of the petitioners are lawyers (Pet. Brief at 4, n. 1), and the classes have never been certified (Pet. Brief at 8, n. 14). Given the makeup of the class representatives, and the representation to this Court on March 14 that they were "inclined to abandon" the litigation, there is, of course, a substantial question whether or not the class will ever be certified. Nevertheless, respondents must still bear the substantial costs of the defense.

the Veterans Administration (HUD-VA Report), *nearly 40% reported no payment of a real estate commission*. That statistic dramatically refutes the above-quoted representations that REALTORS® are "indispensable." Indeed, if REALTORS® were "indispensable" there would be no need to indulge in the alleged restraint of trade which is the subject of this case, as each REALTOR® could charge whatever the traffic will bear. Such is not the case, and sharply increased legal expenses will no doubt have the effect of driving REALTORS® from the business, and forcing consolidations. Ultimately, large organizations, who may be able to better afford such costs and pass them along to consumers, will take over smaller firms of REALTORS®, thereby reducing competition.<sup>2a</sup>

#### PURPOSE OF THIS BRIEF AMICUS CURIAE

NAR's purpose in submitting this brief is to present the views of the chief national representative of the thousands of local real estate boards and individual brokers as to the effects of the position urged upon this Court by the United States in its *amicus* brief.

We shall not duplicate the statement of facts and legal arguments presented in the brief for certain respondents. Indeed, we support and adopt those statements and arguments as our own. Nor do we propose to attack the various arguments marshalled by petitioners in their brief. These arguments are fully met elsewhere.

Instead, we focus on the profoundly disturbing implications of the position adopted by the United States in its *amicus* brief. Essentially the Solicitor argues for the virtual abolition of Fed.R.Civ.P.12(b)(1) in antitrust actions and the concomitant expansion of Congressional

<sup>2a</sup> See, e.g., "Why Merrill Lynch Wants to Sell You a House," FORTUNE, January 29, 1979, pp. 86-89.

power under the Commerce Clause into one of the most local types of business activity: the efforts of a state licensed real estate broker or salesperson in New Orleans in bringing together buyers and sellers of New Orleans residential real property. The Solicitor's argument fundamentally misconceives the local nature of the work for which licensed real estate brokers are actually paid.

As the ensuing argument will demonstrate, the district court correctly determined that the activities of the respondents did not substantially and adversely affect commerce, and this finding cannot be overturned unless "clearly erroneous."

### ARGUMENT

#### A. INTRODUCTION

This case involves the constitutional confrontation between an immovable object and an irresistible force. The immovable object is residential real estate in the New Orleans area—an object of quintessential local nature. The irresistible force is the steadily expanding scope of Congressional power under the Commerce Clause—a force that already has absorbed entire fields of state law and clogged the dockets of the federal courts with a multitude of disputes once resolved in state forums. Here, this fundamental clash over principles of federalism arises in the context of a narrow procedural issue: does Fed.R.Civ.P. 12(b)(1) authorize a district court to dismiss an action brought under the Sherman Act after ample opportunity for discovery fails to establish that the alleged activity occurs in or substantially and adversely affects interstate commerce? The Fifth Circuit answered that question in the affirmative, on the facts adduced in the district court. The inherently local nature of real estate brokerage activity, the full



panoply of state remedies for antitrust violations, the time and expense involved in defending a federal antitrust suit, and the overloaded dockets of the federal district courts are factors compelling this Court to affirm that decision.

**B. THE FIFTH CIRCUIT HAS DEVELOPED EFFECTIVE GUIDELINES FOR RESOLVING JURISDICTION DISPUTES IN ANTITRUST ACTIONS**

In an attempt to strike a balance between the hardships and benefits of an antitrust action, the Fifth Circuit has authorized a rather modest option for its district courts: if the pre-trial discovery and hearings fail to establish the requisite nexus between the allegedly anticompetitive activity and interstate commerce the district court may entertain a Fed.R.Civ.P. 12(b)(1) motion to dismiss the action *unless* "the factual and jurisdictional issues are completely intermeshed." *McLain v. Real Estate Bd. of New Orleans, Inc.*, 583 F.2d 1315, 1323 (5th Cir. 1978); *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416 (5th Cir. 1972); *McBeath v. Intra-American Citizens for Decency Committee*, 374 F.2d 359, 363 (5th Cir. 1967), *cert. denied*, 389 U.S. 896 (1967). If jurisdiction and the merits are inextricably bound, the Fifth Circuit requires "the jurisdictional issues [to] be referred to the merits, for it is impossible to decide the one without the other." *McBeath*, *supra* at 363.

In the proceedings below the district court was able to separate the jurisdictional issue from the substantive issue. The Fifth Circuit approved, explaining as follows:

Here, the issues of jurisdiction could be readily separated from the merits. The substantiality of particular interstate commerce and the nature of the defendants' role in such commerce comprise one issue. A separate analytic concept is raised by the question of whether these defendants conspired to fix the price for their services. *McLain*, *supra*, 583 F.2d at 1323.

Having separated the issues, the district court allowed petitioners months of discovery to establish the jurisdictionally required interstate commerce nexus. The district court carefully reviewed the results of this discovery and concluded that subject-matter jurisdiction did not exist. The Court of Appeals affirmed.<sup>3</sup>

In its *amicus* brief the United States contends the district court erred in dismissing the petitioners' antitrust action despite that court's finding that respondents' alleged activities did not substantially affect interstate commerce. Even though these findings were made after the court provided petitioners with ample opportunity to present evidence of jurisdictional facts, the Solicitor argues that petitioners should be given "an opportunity to prove [their] allegations at trial." (U.S. *Amicus* at 15). The Solicitor's position would virtually force federal courts to passively accept subject-matter jurisdiction over every complaint alleging Sherman Act violations, no matter how local the allegedly anticompetitive conduct appears. Once filed, the complaint would be transformed into a procedural barnacle securely affixed to the court's docket. The district courts, already overburdened, would be forced to postpone until the conclusion of the trial their determination of subject-matter jurisdiction. This is "notice" pleading with a vengeance. It ignores the time and crushing expense of most antitrust trials and casually dismisses the State of

<sup>3</sup> The Fifth Circuit has carefully policed pre-trial dismissals of antitrust actions by its district courts. In *McLain* the court found the "effective use of discovery" to be the "crucial feature" of the case that permitted dismissal. *Supra*, 583 F.2d at 1323 n. 9. In other cases the Fifth Circuit determined the factual and jurisdictional issues to be so completely intermeshed that a pre-trial dismissal was improper. See *McBeath*, *supra*, at 363; *Chatham Condominium Assn. v. Century Village, Inc.*, 1979-2 Trade Cases ¶ 62,742 (5th Cir. 1979).



Louisiana's genuine interest in the regulation and control of the local activities of Louisiana real estate brokers.

The Solicitor cites *Hospital Building Co. v. Rex Hospital*, 425 U.S. 738 (1976), as authority for this position. However, *Hospital Building* plainly suggests that such pre-trial dismissals may be proper after the plaintiff has conducted adequate discovery. In that opinion this Court stated that "in antitrust cases . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Id.* at 746 (emphasis added). That a district court could properly dismiss the action after "ample opportunity for discovery" fails to establish the requisite jurisdiction was indicated in a footnote to the opinion:

It may, of course, be that even though petitioner's complaint adequately alleges an effect on interstate commerce, further proceedings in this case will demonstrate that respondents' conduct in fact involves no violation of law, or indeed no substantial effect on interstate commerce. *Id.* at 746 n.5 (emphasis added).

Thus, while *Hospital Building* establishes a strong presumption against the dismissal of an antitrust complaint prior to discovery, that decision plainly permits dismissal of a complaint after "ample opportunity for discovery" has failed to demonstrate the requisite nexus between the alleged restraint of trade and interstate commerce.

Curiously, the Solicitor stresses the interstate movement of home-buyers and then tries to distinguish the one Supreme Court decision most relevant to this type of jurisdictional argument, *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). (U.S. *Amicus* at 16). In *Yellow Cab*, this Court considered the scope of Sherman Act jurisdiction in the context of two fact patterns: (1) a cab service operating exclusively between rail terminals in Chicago, carrying people from one station to the next to continue their inter-

state journeys; and (2) a cab service serving the general transportation needs of people in the Chicago area, including movement to and from train stations. The former activities were held to be "an integral part of interstate transportation" while the latter operations were found to be beyond the reach of the Sherman Act. *Id.* at 232-233. That *Yellow Cab* remains a significant guidepost for Sherman Act jurisdiction is evidenced by this Court's use of that decision in the recent opinion in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975):

Indeed, it would be more apt to compare the legal services here with a taxi trip between stations to change trains in the midst of an interstate journey. In *Yellow Cab* we held that such a trip was part of the stream of commerce. *Goldfarb, supra* at 784 n.13.

In this case, the Court of Appeals applied this analogy and found a parallel between the "local" cab operations in *Yellow Cab* and the local brokerage activities before this Court:

The distinction *Yellow Cab* draws between integral and incidental activities corresponds to the distinction between *Goldfarb* and the present case. Like the first cab operators in *Yellow Cab*, the attorneys were invariable and indispensable components of interstate commerce. And, as with the second cab activity in *Yellow Cab*, real estate brokerage does not inherently comprehend the interstate aspects of their business. "To the taxicab driver" or the real estate broker, "it is just another local fare." *McLain, supra*, 583 F.2d at 1322.

Having driven his jurisdictional argument to the brink of *Yellow Cab*, the Solicitor attempts to avoid that precedent on the ground that the alleged restraint of trade in this case "affects"—rather than "occurs in"—interstate commerce. (U.S. *Amicus* at 16). Upon some obscure, ill-defined distinction between "affecting" and "occurring in" interstate

commerce this Court is urged to further expand into the realm of traditional state power the reach of the Commerce Clause. A similar attempt to extend Sherman Act jurisdiction was rejected with language appropriate here:

This is an effort to utilize incidental minor activities . . . as a jurisdictional foundation for a substantive charge of alleged federal anti-trust violations. The effort is strained and, in this Court's opinion, overreaching. The foundation is patently incapable of supporting such a structure. *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, 303 F.Supp. 850, 854 (E.D. Mich. 1964).

In essence, the Solicitor is urging this Court to virtually abolish the use of Fed.R.Civ.P. 12(b)(1) motions in actions brought under the "affecting" interstate commerce theory of Sherman Act jurisdiction. This extreme proposal goes well beyond the opinions in the handful of cases finding jurisdictionally sufficient "affects" on interstate commerce caused by real estate brokerage activities in factual contexts differing from the record here. *United States v. Greater Syracuse Bd. of Realtors, Inc.*, 449 F.Supp. 889 (N.D.N.Y. 1978), found Sherman Act jurisdiction over the allegedly anticompetitive activities of a metropolitan real estate board; however, the court stressed that the "existence of Sherman Act jurisdiction must be determined on a case-by-case basis by an evaluation of the relevant economic facts." *Id.* at 891. In distinguishing *McLain*, the district court in *Greater Syracuse* stressed one "significant" factor that established a jurisdictionally sufficient nexus between the brokerage activities and interstate commerce: allegations of "interstate movement of a substantial amount of money in the form of referral commissions and relocation service commissions." *Id.* at 895. By contrast, petitioners here neither alleged nor proved that respondents were substantially engaged in forwarding or receiving substantial amounts of money derived

from interstate referral or relocation services. (Pet. App. 9a).

The Fourth Circuit adopted this case-by-case analysis of Sherman Act jurisdiction in an appeal by real estate brokers of their felony convictions for antitrust violations. *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979). Although jurisdiction in this post-conviction appeal was implied from a general jury finding of guilt, the *Foley* court felt compelled to further distinguish that case from cases like *McLain* on the ground that an unusually high volume of out-of-state buyers and sellers were involved in the real estate market of Montgomery County, Maryland, a peculiarly transient urban area contiguous to Washington, D.C. *Id.* at 1330 n. 4.

*Mortensen v. First Federal Sav. and Loan Ass'n.*, 549 F.2d 884 (3rd Cir. 1977), adopted a highly skeptical stance toward the use of Rule 12 motions in antitrust cases; nevertheless, that court left open the possibility of a pre-trial dismissal where a plaintiff, as here, has been given "ample opportunity for discovery." *Id.* at 896.<sup>4</sup>

Unlike the situations in *Hospital Building*, *supra*, and *Mortensen*, *supra*, petitioners here *were* given "ample opportunity for discovery" and these "further proceedings" failed to demonstrate a substantial affect on interstate commerce.

<sup>4</sup> In addition, the facts in *Mortensen* suggest that sympathy for the plaintiff's lawyer played a significant role in the reversal of the trial court's dismissal of the complaint. Discovery in the civil antitrust suit had commenced in December of 1974. One month later the plaintiff moved for class certification and to amend the complaint. The Rule 23 certification hearing was postponed. The following month the defendants filed a battery of motions seeking dismissal under Rule 12(b)(1), Rule 12(b)(6), Rule 56, etc. Plaintiff's attorney arrived at the hearing in April under the mistaken



**C. THE DISTRICT COURT CORRECTLY DISTINGUISHED *GOLDFARB v. VIRGINIA STATE BAR*, 421 U.S. 773 (1975)**

To provide petitioners with an opportunity to meet their burden of proving the existence of subject-matter jurisdiction,<sup>5</sup> the district court ordered further discovery regard-

belief that only class certification was to be considered; he apparently believed the defendants' motions would be argued at a later date. Consequently, he was unable to discuss the defendants' various motions. None of the attorneys mentioned the 12(b)(1) motion at the hearing. At the close of the hearing and after the judge indicated he would take the case under advisement, the judge asked, "Can anyone tell me what part of the market the defendants have?" No one could answer, and no subsequent market information was filed with the court. *Mortensen, supra, Id.* at 888 n.11.

In sharp contrast, plaintiffs here were amply prepared to argue the issue of subject-matter jurisdiction, having been given months to devote to the development of their evidence of Sherman Act jurisdiction.

<sup>5</sup> The party asserting federal jurisdiction has the burden of showing that he is properly in federal court. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936).

[The plaintiff] must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are

ing the applicability of *Goldfarb*, explaining its order as follows:

We reasoned that, to the extent the financing and insurance aspects of real estate transactions may be shown to be interstate in nature, defendants' practical nexus therewith might satisfy the jurisdictional requirement of the Sherman Act pursuant to the Supreme Court holding in *Goldfarb v. Virginia State Bar. McLain, supra*, 423 F.Supp. at 983.

In *Goldfarb, supra*, this Court identified two factors that could combine to transform the inherently local nature of the legal services involved in a real estate transaction into activity sufficient to support Sherman Act jurisdiction:

- (1) A "substantial volume" of interstate commerce was involved in the overall transaction; and
- (2) The challenged activity was an "integral" part of the transaction and "inseparab[le]" from its interstate aspect. 421 U.S. at 785.

The district court reviewed the results of months of discovery and found that petitioners had failed to establish a *Goldfarb*-type basis for jurisdiction under the Sherman Act. Specifically, the court found that petitioners had been

challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging justify his allegations by a preponderance of evidence. *Id.* at 189.

*See Gibbs v. Buck*, 307 U.S. 66, 93 (1939) (Black J., Dissenting):

Rigid enforcement of the jurisdictional requirement will limit the interference of Federal courts in State legislation and will accord with the policy of Congress in narrowing the jurisdiction of Federal courts by successive increases in the jurisdictional amount.

unable to satisfy the second criterion of *Goldfarb*, i.e., that the real estate brokerage at issue constituted an integral part of the interstate commerce of title insurance and realty financing. *McLain*, *supra*, 432 F.Supp. at 983. Further, the district court found that petitioners had failed to establish evidence in support of their "affecting" commerce jurisdictional theory. *Id.* at 983 n.2, 985.<sup>6</sup>

The district court's findings were clearly reasonable. The four months of discovery produced essentially uncontradicted evidence that the brokerage function terminates when a home-buyer and seller are brought together. Though petitioners produced some evidence that certain real estate funds and title insurance policies are secured or guaranteed by out-of-state sources, none of the evidence refuted testimony that real estate brokers occupy no more than an incidental informational role with respect to these arguably interstate activities. *McLain*, *supra*, 432 F.Supp. at 984-985. The actual financing and insurance processes involve only the home-buyer and the lender or insurer; the brokerage relationship has already terminated at this point.

<sup>6</sup>Such findings cannot be reversed unless clearly erroneous. When a district court must determine facts in ruling on a Rule 12 motion, these findings are entitled to the "clearly erroneous" standard of review. *United States v. Oregon State Medical Society*, 343 U.S. 326, 338-339 (1952); 5A Moore's Federal Procedure, ¶ 52.08 at 2738-2739; *Hayes v. Parkview-Gem of Hawaii, Inc.*, 71 F.R.D. 436, 440 (D.Haw. 1976); *Krasnov v. Dinan*, 465 F.2d 1298, 1299-1300 (3rd Cir. 1972); *Hoffman v. Lenjo*, 433 F.2d 657, 658 (3rd Cir. 1970); *Walden v. Broce Construction Company*, 357 F.2d 242, 245 (10th Cir. 1966); *Hill v. Gregory*, 241 F.2d 612, 614 (7th Cir. 1957). The "clearly erroneous" standard applies even to "inferences drawn from documents or undisputed facts." *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963).

#### D. THE DISTRICT COURT CORRECTLY NARROWED THE SCOPE OF DISCOVERY TO THE APPLICABILITY OF *GOLDFARB*

In focusing the discovery on the issue of applicability of the jurisdictional criteria established in *Goldfarb*, the district court discarded petitioners' allegations that movement of home-buyers constituted an "effect" on interstate commerce:

[T]he mere interstate movement of a prospective buyer or seller—occurring either prior to or after the furnishing of brokerage services—hardly infuses such services with the requisite impact upon interstate commerce *McLain*, *supra*, 432 F.Supp. at 983 n.2.

The Fifth Circuit affirmed. *McLain*, *supra*, 583 F.2d at 1323. Having failed to establish a *Goldfarb*-type jurisdiction the petitioners now argue they should have been given a chance to offer additional evidence concerning the interstate movement of home-buyers. This contention goes to the core of the growing conflict between the "expansive judicial construction of the commerce clause" and "the growing spirit of federalism manifested at all levels of judicial and legislative decisionmaking." *McLain*, 583 F.2d at 1324. Petitioners seek to bootstrap into interstate commerce Louisiana brokerage services involving the quintessential local product: real property. The Fifth Circuit balked at this attempt to "thrust [the Sherman Act] past its commerce clause anchorage into the residual expanse of state and individual prerogative." *Id.* at 1324.

One month later the Fifth Circuit commented on its holding in *McLain* in a decision finding Sherman Act jurisdiction over the activities of an abortion clinic located in a city which was a regional, interstate center for the provision of medical services. *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (1978). Noting that the flow



of persons crossing state lines to avail themselves of the clinic's services would cease if the clinic were forced to close, the court stated that the holding in *McLain* was not to the contrary:

The court [in *McLain*] applied the substantial effects test and held that Sherman Act jurisdiction is not conferred by the allegation "that many of the defendants' customers are 'persons moving into and out of the Greater New Orleans area.'" 583 F.2d at 1320. We do not read the *McLain* opinion to say that the flow of out-of-state customers is not a factor to be considered in the determining jurisdiction, nor even that jurisdiction can never attach on the sole basis of transactions with out-of-state customers. The court held that residential real estate brokerage activities do not substantially affect interstate commerce because the interstate consequences are remote or incidental. 583 F.2d at 1320 & n.4. That conclusion is unassailable, because few people cross state lines for the purpose of purchasing residential real estate. *Feminist, supra*, 586 F.2d at 540 n.3 (emphasis in original).

In the context of this case, if the Real Estate Board of New Orleans, Inc. ceased doing business tomorrow, along with each of the other real estate brokers who are respondents herein, the likelihood that the flow of persons crossing state lines to purchase real estate in the New Orleans area would be curtailed is nil. There are thousands of licensed real estate brokers in the New Orleans area, and in any event, petitioners' own statistics show that many sales of real estate are made without the use of any broker whatsoever. To put it bluntly, if all of the respondents ceased their brokerage activities tomorrow, the flow of persons in and out of New Orleans buying and selling real estate would not be affected one iota. In any event, the effect, if any effect at all, would not be "substantial and adverse". Furthermore petitioners have neither alleged nor proven any cause-and-

effect connection between petitioners' alleged restraint of trade and the flow of interstate commerce.

A reasonably clever attorney can always allege some "effect" on interstate commerce.<sup>7</sup> But Sherman Act jurisdiction is not satisfied by some speculative "effect" on interstate commerce. In a line of decisions defining Sherman Act jurisdiction this Court has consistently required that there be a showing of "substantial and adverse" effects on interstate commerce. *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 743 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 758 (1975); *United States v. Employing Plasterers Assoc.*, 347 U.S. 186, 187 (1954); *United States v. Women's Sportswear Assoc.*, 336 U.S. 460, 464 (1949); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948).<sup>8</sup>

When the district courts have found the nexus between the alleged conduct and interstate commerce too slight to support subject-matter jurisdiction, they have dismissed the

<sup>7</sup> As one court noted, "the complexity of modern business leaves little room for contracts, or business transactions, which cannot be said in some degree to affect interstate commerce." *Marston v. Ann Arbor Property Managers Ass'n.*, 302 F.Supp. 1276, 1279 E.D. Mich. 1969), *aff'd*, 422 F.2d 836, 837 (6th Cir. 1970), *cert. denied*, 399 U.S. 929 (1970).

<sup>8</sup> For example, in *Women's Sportswear, supra*, an association of stitching contractors which handled fifty percent (50%) of all sportswear produced in Boston had prevented price competition by forcing jobbers to enter into agreements constituting restraints of trade. In support of its conclusion that the unlawful restraint substantially affected interstate commerce, this Court stated:

The Boston area ranks fifth in this country's production of women's sportswear. Its jobbers obtain 80% of the cloth used from sources outside of Massachusetts. At least 80% of the finished sportswear is sold and shipped to customers outside of that state. *Id.* at 461-62.

action prior to trial. Several courts have refused to recognize subject-matter jurisdiction over alleged anticompetitive activities relating to real estate transactions.<sup>9</sup> The consensus of these decisions is that "mere movement of individuals from one state to another in order to utilize particular services does not transform those services into interstate services within the meaning of the Sherman Act." *Diversified Brokerage Services Inc. v. Greater Des Moines Bd. of Realtors*, 521 F.2d 1343, 1346 (8th Cir. 1975); *Bryan v. Stillwater Bd. of Realtors*, 578 F.2d 1319, 1325-1326 (10th Cir. 1977); *Marston v. Ann Arbor Property Managers Ass'n.*, 302 F. Supp. 1276, 1279, *aff'd.*, 422 F.2d 836, 837 (6th Cir. 1970), *cert. denied*, 399 U.S. 929 (1970); *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, 303 F.Supp. 850, 954 (E.D.Mich. 1964). In the case below the alleged restraints concerned the

<sup>9</sup> Cases refusing Sherman Act jurisdiction over actions unrelated to real estate transactions include: *Page v. Work*, 290 F.2d 323 (9th Cir. 1961) (conspiracy to exclude local newspapers from publishing legal notices); *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) (anticompetitive activities "directed at" local incidents of victim's garbage disposal business); *Kallen v. Nexus Corp.*, 353 F.Supp. 33 (N.D.Ill. 1973) (interstate advertising, solicitation, preparation of course materials, competition for lecturers, and movement of students did not alter local character of bar review course); *Elizabeth Hospital v. Richardson*, 269 F.2d 167 (8th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959) (hospital); *Spears Free Client and Hospital v. Cleere*, 197 F.2d 125 (10th Cir. 1952) (hospital); *Lieberthal v. North Country Lane, Inc.*, 332 F.2d 269 (2nd Cir. 1964) (operation of bowling alley is essentially local); *Evanston Cab Co. v. City of Chicago*, 325 F.2d 907 (7th Cir. 1963), *cert. denied*, 337 U.S. 943 (1964) (taxi cabs); *Rosemound Sand & Gravel v. Lambert Sand & Gravel*, 469 F.2d 416 (5th Cir. 1972) (sand and gravel mined and sold in Louisiana for Louisiana construction projects is local activity); *Lawson v. Woodmere*, 217 F.2d 148 (4th Cir. 1954) (burial vaults); *Hotel Phillips, Inc. v. Journeymen Barbers*, 195 F.Supp. 664 (W.D.Mo. 1961), *aff'd. per curiam*, 301 F.2d (8th Cir. 1962) (barbers in metropolitan area).

purchase and sale of real estate in the New Orleans area. This is local commerce and the competition allegedly restrained is local in nature. *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, *supra* at 854; *Marston v. Ann Arbor Property Managers Ass'n.*, 302 F.Supp. 1276, 1279 (E.D. Mich. 1969); *aff'd.*, 422 F.2d 836, 837 (6th Cir. 1970), *cert. denied*, 399 U.S. 929 (1979).

Under our system of federalism the states have traditionally controlled and defined the legal rights and powers attending the purchase, use, and sale of real estate. As this Court has stated:

[Federalism embodies] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

As with all states, Louisiana regulates the activities of its real estate brokers.<sup>10</sup> In Louisiana a Real Estate Commission promulgates the standards and procedures for obtaining a brokerage license and polices the activities of the state's brokers.<sup>11</sup> A real estate transaction in Louisiana must be consummated and perfected entirely in accordance with Louisiana law, and Louisiana law alone. In addition, Louisiana has enacted its own antitrust statutes that provide civil remedies for injured parties and establish criminal

<sup>10</sup> La. Rev. Stat. Ann. §§ 37:1431 to 1464 (West. Supp. 1979).

<sup>11</sup> La. Rev. Stat. Ann. §§ 37:1432 to 1435 (West. Supp. 1979).



and civil sanctions for antitrust violations.<sup>12</sup> Reflecting its citizens' vigorous opposition to anticompetitive activities carried on within state boundaries, the Louisiana Constitution declares that "all combinations, trusts, or conspiracies in restraint of trade, commerce or business, as well as all monopolies or combinations to monopolize trade, commerce or business, are hereby prohibited in the State of Louisiana. . . ." La. Const. Art. XIX, § 14. In short, the State of Louisiana has a fundamental interest in regulating the purchase and sale of real estate within its boundaries.

In *Marston, supra*, similar state concerns underpinned the court's finding that an alleged conspiracy to fix the price level of rental apartments in Ann Arbor, Michigan, did not have a substantially adverse effect on interstate commerce:

If the court were to assume that defendants' actions, indirect and remote as they may be to interstate commerce, were to affect interstate commerce, it would follow that all such acts, remote to the main stream of interstate commerce, are subject to the federal antitrust laws, no matter how local may be their operations. What then remains of state antitrust enforcement? The State of Michigan specifically provides regulations for and safeguards against "Restraint of Trade" through its own and adequate laws. . . .

The "Restraint of Trade", if any, is strictly a local problem. Plaintiffs should seek their remedy under state law. *Marston, supra*, 302 F.Supp. at 1280.

In addition to the local nature of real estate, the full panoply of state-law remedies for antitrust violations, and the bottleneck of cases pending in the federal courts, antitrust suits frequently entail enormous expense:

Win, lose, or draw regarding the final outcome, the very fact of trial may result in crushing costs and

<sup>12</sup> La. Rev. Stat. Ann. §§ 51:121 to 152 (West).

hardships to the defendant. *McLain, supra*, 583 F.2d at 1323.

This combination of factors justified the district court's decision to discard the petitioners' attempt to bootstrap their local action into a Sherman Act case through allegations of interstate movement of home-buyers.

### CONCLUSION

For these reasons, NAR and its members urge this Honorable Court to affirm the judgment of the District Court and the Court of Appeals.

Respectfully submitted,

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Dated: September 13, 1979

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of September, 1979, the undersigned counsel caused three copies of this Brief *Amicus Curiae* to be hand delivered, or delivered by U.S. mail, postage prepaid, to counsels for respondents, petitioners, and the United States. I further certify that all parties required to be served have been served.

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